



DRAFT

REPORT TO THE SECRETARY

USDA's Office of Tribal Relations and Forest Service Policy and
Procedures Review: Indian Sacred Sites

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July 2011

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EXECUTIVE SUMMARY

Report to the Secretary of Agriculture

USDA Office of Tribal Relations and Forest Service Policy and Procedures Review Indian Sacred Sites

Why this report?

This *Draft Report to the Secretary* is a tool for evaluating the current condition of Native American Sacred Sites protection, pursuant to Executive Order 13007 and other policies and procedures, on National Forest System (NFS) lands throughout the United States. Secretary of Agriculture Thomas J. Vilsack requested information about unintended consequences of land management decisions affecting Native American Sacred Sites and communities whose cultural survival is deeply rooted to these sites.

In response to Secretary Vilsack's request, the U.S. Department of Agriculture's (USDA) Office of Tribal Relations and the USDA's Forest Service formed a team, led by four senior executives, to talk to Tribes and other Native American communities about how the Forest Service can do a better job incorporating Sacred Sites issues into the agency's mission to deliver forest goods and services for current and future generations on NFS lands. More than 50 meetings (listening sessions) were held across the Nation. They were held in Indian Country, in Alaska Native villages, telephonically and face to face, at intertribal venues, and at numerous other locations as requested by the Tribes. These listening sessions reached out to native communities, engaging not only tribal leadership but also culture-keepers, traditional practitioners, and unaffiliated native descendants. The team conducting this review also surveyed Forest Service employees to learn what they think and what they have observed about the effectiveness of the agency's efforts to manage land that includes Sacred Sites. The review included a thorough study of current laws, rules, regulations, and policies that affect the ability of the Forest Service to protect Sacred Sites.

What did we hear?

Three broad but distinctive themes emerged from these listening sessions:

I. People: The need for effective communications and relationships.

Partnering with Tribes to manage Sacred Sites is critical to their protection. Although we heard many success stories about successful partnering and communication between Tribes and the agency, we also heard about inconsistencies in Forest Service consultative/collaborative processes. Forest Service attempts at consultation are ineffective when done in ways that Tribes do not consider meaningful.

II. Law/Policy: The use of authorities and tools available to the Forest Service

We heard that land managers sometimes do not use discretion available to them in current laws and policies for the benefit of the Tribes. Listening session participants and Forest Service employees told us Sacred Site issues are not always weighed equally to competing "multiple uses" of the NFS. Tribes and agency employees expressed serious concerns with Executive Order 13007 and the 1872 Mining Law.

III. Actions/Land Management: Application of authorities and tools through agency management activities

In some instances, the Forest Service has recognized and protected Sacred Sites using currently available legal tools. Some NFS land management decisions and actions, and the activities of third

parties, however, have led to damage, destruction, and desecration of Native American Sacred Sites. The consistent on-the-ground application of currently available tools could begin to reverse past harms to Sacred Sites.

What else did we learn?

The listening sessions and employee survey revealed that Native Americans and Forest Service managers share many of the same concerns about Sacred Sites protection. The broad themes developed from the listening sessions are consistent with the Forest Service employee survey.

Forest Service managers would benefit from more explicit policy language to protect Sacred Sites.

It is within the discretion of the agency under current law, regulation, and policy to provide for greater protection of Sacred Sites.

Some Tribes are grateful that their Sacred Sites are within NFS boundaries rather than owned by private individuals, companies, or other ownerships that might not value their cultural traditions.

What recommendations did we make?

Most of the recommendations made in this report are within the scope of the current authorities available to the Forest Service to implement, but are contingent on the availability of funding. These recommendations should not be construed as commitments to request additional funding. Some recommendations will require action by the Secretary's Office, the President, or Congress to fully realize. The recommendations are described on pages 15 to 18, and briefly summarized here:

I. Improve relationships through communication, training, staffing, and accountability.

Build relationships and improve communication through regularly scheduled consultations and use of written agreements. Training should cover relationship building, protection, tools, and cultural competency; Native Americans should be invited to assist. Forest Service succession planning should include more full-time tribal relations managers and liaisons, recognizing that current and future budget constraints will be a challenge to any adjustment. Recruitment and outreach should be focused on Native Americans, with an objective of increasing the overall diversity of Forest Service employees. Line officers should be held accountable for protecting Sacred Sites through performance measures or other means.

II. Review and revise directives, explore changes to Executive Order 13007, and clarify existing legislation.

Expediently review and revise USDA and Forest Service directives, incorporating Sacred Sites protection. Add a new concept of "Sacred Places" to the agency's directives to step beyond the narrow definition of Sacred Sites in Executive Order 13007. Work to improve Executive Order 13007 by revising the definition of Sacred Sites and enhancing the Executive order's confidentiality requirement. The agency should look for opportunities to strengthen and simplify confidentiality requirements in the next revision of the Farm Bill.

III. Improve on-the-ground Sacred Site protection through partnerships, access, and protections.

Partner with and recruit Native Americans to help do a better job of interpretation, law enforcement, archaeology, youth involvement, and other functions. Ensure that agency and Tribal personnel are

aware of authorities and direction to accommodate Native American access for religious, ceremonial, or other purposes. Increase Sacred Sites protections through consultation, confidentiality, and law enforcement. Current and future budget constraints may impact the Forest Service ability to enhance these efforts.

Where do we go next?

This draft report will be made available to Tribes through October 2011 for consultation and feedback on its contents, and to enhance the recommendations. In listening sessions, Tribes, elders, culture keepers, and traditional practitioners requested continued collaboration with spiritual leaders who may or may not be affiliated with a tribal government. We will incorporate what we hear during consultation with tribal elected officials and others into the final report, which will be submitted to the Secretary in November 2011.

We hope this report will foster change in how Indian Tribes and the Forest Service interact on land management decisions for the good of all Americans. It is our hope that these recommendations lead to meaningful changes in the way Native American Sacred Sites are protected and accessed. Perhaps, just as important, they will lead to a better understanding of Native American values as American values.

The recommendations made in this report will be modified based on consultation with tribal leaders, and further collaboration efforts. USDA will develop an implementation plan in consultation with the Secretary. We expect to develop an implementation plan that will prioritize actions to address the recommendations shortly after the final report is approved by the Secretary.

If we move forward with specific policy changes to address the recommendations in this report, including revisions to Forest Service directives, we will conduct additional Tribal consultation before those changes become final.

The current budget environment indicates that there will likely be continued constrained funding levels in the future. Therefore, actions recommended in this report may have to be accomplished within available funds.

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INFORMATIONAL MEMORANDUM FOR THOMAS J. VILSACK, SECRETARY

THROUGH: Harris D. Sherman
Under Secretary, NRE

FROM: Thomas L. Tidwell
Chief

FOR

JUN 03 2011

SUBJECT: Tribal Consultation on Draft Indian Sacred Sites
FILE CODE: 1560

ISSUE:

You directed the Forest Service and the USDA Office of Tribal Relations to review existing policies and procedures and to examine the effectiveness of current laws and regulations to ensure a consistent level of protection for Native American Sacred Sites located on National Forest System (NFS) lands. Tribal leaders expressed concerns to you about Forest Service decisions including the decision to approve the use of treated waste water for snowmaking at the Arizona Snowbowl ski area on the San Francisco Peaks in northern Arizona. Because of this and other decisions, you asked the Forest Service to consult with tribal leaders to determine how the Agency can do a better job addressing Sacred Sites while simultaneously balancing pursuit of the Agency's mission to deliver forest goods and services for current and future generations.

DISCUSSION:

The Forest Service and USDA appointed a team to consult with Tribes and make recommendations for procedural and policy changes relating to Sacred Sites. The team was led by Janie Hipp, Senior Advisor to the Secretary of Agriculture for Tribal Affairs; Joel Holtrop, Deputy Chief for NFS; James Hubbard, Deputy Chief for State and Private Forestry; and Corbin Newman, Regional Forester for the Southwest Region. This draft document is the interim response to your request and will provide the focal point for tribal consultation on Sacred Site issues this summer.

This draft report is provided as a catalyst for government-to-government consultation with Tribes and as a means through which all Native Americans can continue in collaborative dialogue with the Agency. Recommendations in this draft report are based on what we heard at over 50 in-person and telephonic gatherings ("listening sessions") with Native Americans across the Nation. In addition, the team conducted a survey of Forest Service employees and incorporated those results into this analysis. This draft report also synthesizes current law, regulation, and policy regarding Sacred Sites, incorporates previous work, and considers individual comments.

SUMMARY

We now welcome review of this draft report in consultation and through ongoing collaboration. We look forward to further developing the recommendations together with Native Americans who cherish their Sacred Sites. We seek to provide improved and appropriate access to these sites for ceremonies, gatherings, and other uses. We expect new ideas and refinements in the final report.

Enclosure



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Report to the Secretary of Agriculture
USDA and Forest Service Policy and Procedures Review
Indian Sacred Sites

INTRODUCTION

The Forest Service, an agency of the U.S. Department of Agriculture (USDA), is charged with sustaining the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations. Whether in private, State, Federal, or Tribal ownership, many people from all walks of life consider the forests and grasslands, and the resources they provide, to be sacred. It is abundantly clear that the Nation's Native Americans retain histories, values, and spiritual underpinnings that are inextricably intertwined with the Nation's forests; especially with the national forests. These cultural and physical connections far precede establishment of the United States and the National Forest System (NFS). As Federal executives for the Forest Service and the USDA's Office of Tribal Relations (OTR), we take this charge as a solemn responsibility. If we do not act responsibly to protect the sacred values associated with these lands, we may fall short of the Forest Service fiduciary obligations to Tribes, and we are all diminished. We know so little about Native American Sacred Sites as an agency. It is through the voices of the Native American people that we are learning and confirming the real importance; they instruct us.

NATIVE AMERICAN SACRED SITES

It is not an overstatement to say that all or part of every national forest is carved out of ancestral Native American land. Native Americans' historical and spiritual connection to the land has not been extinguished despite changes in title. Native American Sacred Sites are integral to the lands managed by the Forest Service. Native American Sacred Sites are those locations considered to be sacred by indigenous Americans, the citizens of the 565 Federally Recognized Tribes and other Native Americans who may or may not be associated with a specific federally recognized Tribe. The complexity and breadth of the Forest Service's statutory responsibilities in managing the NFS are immense. The Forest Service manages 193 million acres of national forests and grasslands, visited and shared by millions of members of the American public and the world, each of whom has a different relationship with the land and a different perspective on what activities are appropriate. The agency is required by law to administer the NFS for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.¹ Untold numbers of Native American Sacred Sites are located on these same lands. Other agencies in the USDA and other Federal Departments² also have roles in management that may affect Native American Sacred Sites.

¹ Multiple-Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. §528-531 (1960). (Pub.L. 86-517, June 12, 1960, 74 Stat. 215). MUSYA goes on to state "'Multiple use' means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services...that some land will be used for less than all of the resources...and harmonious and coordinated management of the various resources...with consideration given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output." 16 U.S.C. §531(a).

² U.S. Department of the Interior agencies such as the Bureau of Land Management, the National Park Service, and the U.S. Fish and Wildlife Service, in particular, hold management responsibility for hundreds of millions of acres of Federal land; however, the U.S. Department of Defense and others also have land management responsibilities. While this report will be shared with, and, we hope, be useful for other agencies, the focus of this report is on policies and procedures available to and employed by the USDA, specifically, the Forest Service.

On May 24, 1996, then-President Clinton signed Executive Order 13007 on Indian³ Sacred Sites, to “protect and preserve Indian religious practices.”⁴ It requires Federal agencies responsible for the management of Federal lands, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, to accommodate access to and ceremonial use of Indian Sacred Sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such Sacred Sites. Agencies are required to, where appropriate, maintain the confidentiality of Sacred Sites. The Executive order defines Indian Sacred Sites as

“... any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.”

Executive Order 13007 builds on the body of law that directs or allows Federal agencies to protect or accommodate Native American Sacred Sites and their use. Taken as a whole, this body of law has been drawn on time and time again to either protect or allow the degradation of Native American Sacred Sites. One important observation stands out; it is the practitioners of Native American religions who identify which locations are Native American Sacred Sites.

NATIVE AMERICAN VALUES—CHANGING LANDSCAPES

Between November 2010 and April 2011, Forest Service and USDA managers participated in more than 50 in-person and telephonic listening sessions with more than 500 individual Native Americans across the country and many Tribes⁵. Participants shared stories of challenges and opportunities, as well as how some Sacred Sites had been destroyed or degraded while others had been respected and protected. Tribal leaders and others shared their concerns and observations about relationships, access, sustainability, sovereignty, spirit, and communication through consultation. These communities’ cultural and spiritual practices are tied to their cultural responsibilities and mandates to take care of the natural world by performing ceremonies and rites that are linked to specific places. Throughout the listening sessions, participants told us that Native American Sacred Sites must be protected, not just for their Tribe or to perpetuate their beliefs, but for the health of the entire world. Tribes and others reiterated that Sacred Sites continue to be reduced in number and quality through actions required, or approved, by the Forest Service. Conversely, it is clear there is a growing awareness and appreciation of Native American Sacred Sites by the current Administration and the agency. Some expressed hope that the old patterns of destruction and degradation would give way to new patterns of protection, accommodation, and respect, but many expressed skepticism that this review would result in true change. See figure 1, “Historical Trauma.”

Figure 1: Historical Trauma

The history of Native Americans in America after European contact and colonization is a history of trauma: degradation of Native American populations and cultures from disease, appropriation of and removal from traditional lands, forced disuse of native languages and native subsistence lifeways, separation of families through boarding schools and adoption, suppression of Native American religions, and outright genocide. These actions and others by the Spanish, French, English, and, later, the Government and citizens of the United States, left a legacy of trauma that continues to plague Native American communities. We recognize that the policies of self-determination and self-governance are intended to help remedy some of that harm. We also recognize that the continued existence of and access to Native American Sacred Sites is an important component to necessary healing. To disregard the value of Native American Sacred Sites would perpetuate the cycle of trauma.

³ EXECUTIVE ORDER 13007 refers to “Indian Sacred Sites.” In this report we generally use the term “Native American” as a broadly inclusive term to refer to American Indians, Native Alaskans, First Nations, First Peoples, and other indigenous people. See Glossary, Appendix A, for further explanation of how this and other terms are used in this report.

⁴ Executive Order 13007, May 24, 1996, *see* 61 Fed.Reg. 26771, (May 29, 1996). See Appendix B.

⁵ See Appendix D for the dates and locations of listening sessions.

We heard from participants and Native American Tribal Leaders that the mainstream American society strongly values religious freedom, and yet they feel the legal structures of religious freedom in the United States do not apply to Native American philosophies. The February 2011 publication *America's Great Outdoors: A Promise to Future Generations*, which was jointly developed by USDA, the U.S. Department of the Interior, the U.S. Environmental Protection Agency, and the Council on Environmental Quality, notes:

*"Our appreciation for these special places is rooted in the natural environment as well as in the rich diversity of people, stories, and traditions that have become associated with them over the course of our history. Since our earliest beginnings, the lands, coasts, rivers, forests, and mountains and the resources they hold have helped to define who we are as a people and as a nation. They have also been a source of America's wealth, providing places to reflect, relax, recreate, and create lasting memories with friends and family."*⁶

That statement is core to the American people and to the Forest Service. While most Americans live in urban areas, we are also dependent upon rural lands, particularly forest lands, for clean water and a healthy climate. To Native Americans, "special places" are often sources of cultural, spiritual, sacrosanct connections to the land. For these reasons, conserving forests and grasslands is not a luxury; it is a necessity. Yet America's forests today are threatened like never before. Climate change, catastrophic fires, diseases and pests, and the transformation of working forest lands to increasingly fragmented private parcels have all led to declining ecosystem health. All of these changes have enormous impacts to ecosystems and local economies.⁷ As the health, integrity, and connectedness of forests are threatened, so too are Native American Sacred Sites.

The Forest Service is committed to restoring our forests and the vital resources important to our survival, while wisely respecting the need for a natural resource economy that creates jobs and vibrant rural communities.⁸ Respecting, honoring, accommodating, and protecting Native American Sacred Sites must be part of that commitment. Economic and recreational drivers are important in land management decisionmaking, but not more or less important than Sacred Sites concerns. In the past, however, the Forest Service has not always balanced sacred sites concerns with other values' or used its discretion in land management decisions to find creative ways of incorporating protections for Sacred Sites in its decisions. The Forest Service also must acknowledge that in certain instances, its decision space is very limited, making it hard—perhaps impossible—to protect Native American Sacred Sites in the way the Tribes prefer in specific cases.⁹ Tribes and forests are increasingly entering into proactive agreements which establish a shared understanding of the agency-Tribe relationship. These agreements can improve communications and formalize a productive working relationship and can help the agency to honor its commitments to Tribes.¹⁰

⁶ *America's Great Outdoors: A Promise to Future Generations*, February 2011, p. 1. Available at <http://americasgreatoutdoors.gov/report/>, last viewed April 4, 2011.

⁷ See generally, Smail, Robert A.; Lewis, David J. 2009. Forest-land conversion, ecosystem services, and economic issues for policy: a review. PNW-GTR-797. Portland, OR: U.S. Department of Agriculture, Forest Service, Pacific Northwest Research Station. 40 p.. See also, remarks by Secretary Vilsack, August 14, 2009, Seattle, Wash. Available at <http://www.fs.fed.us/video/tidwell/vilsack.pdf>, last viewed April 4, 2011.

⁸ *Id.*

⁹ For instance, "An Act to Promote the Development of Mining Resources of the United States, May 10, 1872," better known as the "1872 Mining Law," provides little discretion for land managers to effectively deny a permit for mineral exploration.

¹⁰ See <http://www.fs.fed.us/spf/tribalrelations/agreements/index.shtml> for example agreements of this nature.

AN INTERNATIONAL PERSPECTIVE

What we heard in the listening sessions reflects the shared aspirations of indigenous peoples world-wide, as expressed in the United Nations Declaration on the Rights of Indigenous Peoples, for which the United States announced support in 2010.¹¹ The Declaration recognized the “urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.” Of note, Article 12 declares the right of indigenous peoples to manifest, practice, develop, and teach their spiritual and religious traditions, customs, and ceremonies; to maintain, protect, and have access in privacy to their religious and cultural sites; to the use and control of their ceremonial objects; and to the repatriation of their human remains.¹² While the Declaration does not use the words “Sacred Sites,” the concepts in the Declaration relate to Sacred Sites. The U.S. support for the Declaration serves as an affirmation of our national and global aspirations that provides important context for the current review of our policies.

ACCOMMODATING COMMON GROUND

The Forest Service shares nearly 3,000 miles of contiguous border with Native American-owned lands and acknowledges that lands now within the NFS are commonly the ancestral homelands and ceded territories of many Tribes. This makes the agency and Tribes more than just neighbors; they are partners with common goals for social, cultural, ecological, and economic sustainability. Many Tribes have historically managed their own forests well and in ways the Forest Service hopes to emulate. Tribal land management is testament to tribal land ethic, an ethic rooted in their traditions, stories, and cultures. Native American Sacred Sites, both on their land and within the national forests, are important facets of that land ethic and a common bond between us.

The Forest Service acknowledges the conflicts over Native American Sacred Sites and their origins from both within and outside the agency. However, the agency also recognizes that many Sacred Sites on NFS land and many relationships between Tribes and national forests are being appropriately and positively cared for. It is only through positive relationships that the Forest Service can work together with Tribes to meet the goals they have in common. Many Forest Service employees realize that protection of Sacred Sites and ensuring improved access to those sites by those who hold them to be sacred do not conflict with the Forest Service mission; indeed, they are part of it. We heard from Forest Service employees, including many line officers—regional foresters, forest supervisors, and district rangers who are the on-the-ground decisionmakers for the agency—that they take seriously the charge to better protect Sacred Sites. They are looking for ways to accommodate the needs of the Native American people who use these sites, and, in many cases, are finding ways to do so. Their efforts are enhanced by legislation in the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill, see [Appendix C](#))¹³ providing for reburial of repatriated human remains on NFS lands, for keeping culturally sensitive information confidential, and for temporarily closing portions of NFS lands for cultural and traditional uses. Their efforts are further strengthened by the high level of visibility the current review has engendered. They recognize top-level support from the agency, the Department, and the President.

¹¹ For further explanation of the United States’ position on the Declaration and many initiatives in Indian country, see Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples -- Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples, which was released to accompany the President’s statement in support of the Declaration, at <http://www.state.gov/documents/organization/153223.pdf>.

¹² United Nations Declaration on the Rights of Indigenous Peoples, Article 12 (2007). Available at <http://www.un.org/esa/socdev/unpfii/en/drip.html>, last viewed April 4, 2011. See also “Synthesis of the Legal Landscape,” below, and Appendix G, “Existing Authorities”.

¹³ Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, §§8101-8107. (June 18, 2008).

METHODOLOGY

GATHERING INFORMATION

The Forest Service and tribal communities have interacted for many years on Sacred Sites issues. The current review builds upon this foundation by incorporating information from many different sources:

Listening sessions. The listening sessions were conducted from November 2010 to April 2011 and provided the core information used to develop this report. The sessions included national telephonic listening sessions, regional- and local-level in-person meetings, and listening sessions that were appended to national and regional meetings of intertribal organizations and other types of Native American groups. Participants included federally recognized tribal leaders, Alaska Native Corporations, State-recognized Tribes, elders, traditional practitioners, culture keepers, Native Americans not affiliated with any specific Tribe, and others. Several Tribes requested government-to-government consultation on Sacred Sites issues at this early stage, and these requests were honored. The sessions focused on five key questions addressing:

- Past and current experience interacting with the Forest Service regarding protection, care, and preservation of Sacred Sites;
- Whether existing laws, regulations, policies, and procedures have been effective in protecting Sacred Sites;
- What changes are desired to better address Sacred Sites, including regulations and/or policies;
- How consultation should proceed on the Draft Report to the Secretary of Agriculture; and
- Any other issues regarding Sacred Sites.

For more information regarding how the information was collected, tracked, and summarized, see [Appendix D](#) for a table listing listening session locations and a description of the themes heard at the listening sessions, with examples.

Forest Service employee survey. To assess Forest Service personnel's experience and knowledge around Sacred Sites, the Executive Team conducted a survey of employees, asking them to describe their challenges, successes, tools, needs, and recommendations for working with Tribes to protect Sacred Sites. See [Appendix E](#).

Analysis of current law, regulations, and policies. To ascertain the current legal and policy landscape surrounding Forest Service's ability to protect Sacred Sites, the team conducted a review of current laws, regulations, policies, procedures, and relevant case law. See "Synthesis of the Legal Landscape" below, and Appendices F, Selected Court Decisions, and G, Existing Authorities.

Previous review. The current review used summary information from a preliminary fact-finding effort regarding agency Sacred Sites policies that took place from 2003 to 2007. Information from the earlier effort is integrated into the current review; it is consistent with what was heard during the recent listening sessions. See [Appendix H](#).

Mailed and emailed comments. Interested people sent a number of emails, either in connection with a particular listening session or other in-person event, or independent of any particular session, to a designated email address: tribalsacredsites@fs.fed.us. Some comments were mailed to Washington Office or regional staff in connection with this effort, and these were also incorporated into the review.

Consultation on draft recommendations for policy changes. Consultation on the current draft report will continue through September 2011, and the results of the Consultation will be integrated into the final report to be submitted to the Secretary of Agriculture.

PERSONNEL CONTRIBUTING TO THIS EFFORT

A team of four senior executives from the USDA and the Forest Service led the development of this report. They are Janie Hipp, Senior Advisor to the Secretary of Agriculture for Tribal Affairs; Joel Holtrop, Deputy Chief for the NFS; James Hubbard, Deputy Chief for State and Private Forestry (S&PF); and Corbin Newman, Regional Forester for the Southwest Region. The Executive Team was supported by a small core team comprised of staff from the USDA OTR and from the Forest Service at the Washington Office, regional office, and forest levels. Many other Forest Service line officers and staff in the field worked to conduct outreach, listening sessions, and document what was heard. The Udall Institute for Environmental Conflict Resolution (USIECR) (under the Udall Foundation, an independent Federal agency), as well as Triangle Associates, Inc. (Triangle) assisted with process design, as neutral third parties, as facilitators, and with compiling and summarizing what was heard.

ACKNOWLEDGEMENTS AND RECOMMENDATIONS

We listened intently to the voices of Native America across the country. We heard about the values, experiences, feelings, beliefs, and expectations people have about the places they hold sacred. We also heard many excellent suggestions about how the agency can do a better job of protecting those places. The thousands of individual comments were profound and meaningful; in [appendix D](#), we offer a more detailed presentation of the overarching themes those comments represent. Those comments and themes reflect a variety of issues around processes, content, and relationships in the context of rights, partnership opportunities, and administrative flexibility and consistency. They also lead us to recommendations for actions that we believe will have the greatest impact in protecting Sacred Sites. Before describing our recommended actions, we first recognize some of the concerns we heard. These acknowledgements are intended as a step toward fostering better relationships that improve protection of Sacred Sites in the future.

ACKNOWLEDGEMENTS

We recognize that *activities permitted* by the Forest Service and other agencies affect Sacred Sites in ways many Native Americans consider damaging. While we acknowledge the complexity of balancing the pursuit of goods and services from the national forests for all Americans, we encourage dialogue about addressing past actions in order to build trust between tribal leadership and the Forest Service, with an eye to the future. We acknowledge the frustration of multiple and overlapping requirements from different land management agencies and agree that consistency between Federal agencies whose decisions impact Sacred Sites is important. We intend to share lessons learned with other agencies.

We heard many concerns about the impacts to Native Americans' use of and access to Sacred Sites stemming from the agency's decisions permitting *recreation activities*, including rock climbing, interpretation, outfitting/guiding, and travel management. Specifically, we heard numerous concerns with the Forest Service's decision to permit the use of reclaimed wastewater for creating artificial snow at the *Arizona Snowbowl on the San Francisco Peaks* from people participating in listening sessions, many of whom strongly urged the agency to reverse this decision. We recognize that this decision has had profound impacts on the agency's relationships with many Native Americans, but we hope this review and the changes that will result from it will begin to address some of the concerns we heard. We understand that the dialogue this review has engendered is merely a beginning and that *better, more consistent, and more meaningful consultation, communication, and understanding* between the agency and Native Americans will be necessary if we are to avoid similar circumstances in the future. The Forest Service will strive to achieve these ideals while balancing the complexities of its statutory mandates.

In listening sessions with Native Americans, we heard *economic values often hold greater weight* in agency decision making on balance than traditional and cultural values. Some Forest Service employees stated they had no way of "valuing" Sacred Sites in the current agency analysis and decisionmaking framework. Those commenting expressed that competing extractive and recreational interests were usually given greater consideration than Sacred Sites. We believe the agency can do a better job of incorporating Sacred Sites into its multiple-use mission, and that the Forest Service mission is broad enough to include Sacred Sites protection.

The need for better *relationships and communication* between the agency and Native Americans was unquestionably the most common issue raised. We acknowledge that *continuity of leadership* is often lacking due to frequent turnover of Forest Service line officers, as well as tribal leaders. This turnover can present challenges to establishing and maintaining relationships between the Forest Service and Tribes. The development and maintenance of *agreements* between Tribes and agencies can help to bridge these transitions while new leaders build personal relationships. However, some work to ensure incoming leaders are familiar with existing agreements is required. Written agreements and memorandums of understanding (MOUs) are among the best ways to establish stable, consistent understanding and provide a foundation for relationships between Tribes and the agency. Agreements can establish estimated timeframes, schedules of regular communication, methods of communication, and processes for protection of Sacred Sites. An example proposed as a model for regular communication between agency employees and Tribes was the annual “To Bridge a Gap” conference.¹⁴ This report recommends seeking increased Native American participation on advisory committees, including resource advisory committees, and establishing a schedule for regular consultation meetings at the forest level to help improve relationships and move towards better overall communication.

We heard many participants at the listening sessions express interest in developing a *co-management approach*, and requests to develop or enter into “co-management agreements” with Tribes to protect Sacred Sites. The Forest Service cannot delegate decision-making authority for actions on NFS land to entities outside the Federal Government. The agency, however, commits to exploring partnership approaches and agreements, *as funding allows*, that enable the agency and Tribes to achieve shared management goals. We recognize “co-management” is not well defined and means different things to different people. We heard that some consider “co-management” as equal decisionmaking authority; others think of it as any involvement in a project. We believe that a case-by-case approach to crafting partnership agreements *within funding availability* to meet shared objectives is appropriate. The type of instrument used to memorialize such an agreement will depend on the specific resources, Sacred Sites, Tribes, and forests involved, but the agency has statutory authority to enter into many different types of agreements with Tribes and other entities. These agreements may include Challenge Cost-Share agreements, Wyden agreements, participating agreements, MOUs, or stewardship agreements pursuant to the Tribal Forest Protection Act, for example.¹⁵ Tribes entering into agreements such as these with the Forest Service could help to memorialize some aspects of “co-management” that are desirable to Tribal partners, without violating agency statutory obligations or unlawfully delegating Federal authority. What “co-management” means in a particular agreement should be jointly defined by the parties to the agreement. The agency commits to facilitating Tribal access to partnership resources, sharing examples of agreements with Tribes that include “co-management”-type provisions,¹⁶ and exploring whether changes to agency directives or statutory changes are necessary to achieve shared goals for Sacred Site protection.

¹⁴ For more information on “To Bridge a Gap” see <http://www.chickasaw.net/tbagx/about.htm>

¹⁵ See, for example, <http://www.partnershipresourcecenter.org>, produced in partnership with the National Forest Foundation, the Forest Service, and the USDA, last visited May 18, 2011.

¹⁶ For more information on all these types of agreements and their use, see <http://www.fs.fed.us/spf/tribalrelations/links.shtml>, last visited May 18, 2011.

There is no statute mandating protection of Sacred Sites in all instances, but the *Forest Service has considerable authority that supports protection and discretion* to protect Sacred Sites within the current legal framework. See “Synthesis of the Legal Landscape,” following the recommendations below. The agency’s legal decision space includes opportunities for protection of Sacred Sites, although the Forest Service does not always use this discretion to act in ways that protect Sacred Sites. This decision space can and should be used by the Forest Service in a manner more protective of Sacred Sites. We believe our exercise of discretion to act in a positive way toward Sacred Sites will further the intent of existing legal and policy responsibilities and will help us to achieve the goals of the United Nations’ Declaration on the Rights of Indigenous Peoples.

Increased use of the agency’s discretion to protect Sacred Sites must begin with an understanding of what is truly sacred to Tribes. Throughout the listening sessions, as well as through the Forest Service employee survey, we heard that Executive Order 13007’s definition of Sacred Sites is inappropriate, limiting, too focused on religion, and does not accurately represent what Native American people consider sacred. To enrich the agency’s understanding and provide an opportunity for broader dialogue with Tribes about what is sacred to them, we encourage discussion around the concept of “Sacred Places” as described in figure 2. This language was developed based on what we heard in the listening sessions, and we hope it captures more accurately the scope and variety of sacred areas, places, sites, landscapes, and biological communities on NFS lands. The Forest Service does not intend for the concept of Sacred Places to replace Sacred Sites in Executive Order 13007 nor does the agency necessarily intend “Sacred Places” to receive the same type of scrutiny as Sacred Sites, as it recognizes that the latter is limited to discrete, specific locations, while a Sacred Place might be a larger scale geographic feature. Rather, the intent of including this language here is to inspire Forest Service line officers to “walk in the woods” with Native Americans to learn more about their Sacred Places and to focus on that knowledge when making land management decisions. This report recommends that the Forest Service use this more expansive concept of “Sacred Places” in discussions with Tribes, emphasize it in training, and explore ways to incorporate the concept into the Forest Service’s decisionmaking processes. See recommendation II.A.2.

Tribes and individual Native Americans have experienced a *lack of access to Sacred Sites* for practitioners, elders, and other Native American people who need it, while in other cases, open access for the general public and even native people has resulted in vandalism, theft, and exploitation of Sacred Sites. We recognize that the permitting process for certain types of gathering and access can be a lengthy process and can be seen as a barrier. We believe that some of the newer authorities the agency now has will help in this regard, especially those relating to closures, forest products, and confidentiality. See [appendix C](#), 2008 Farm Bill Provisions.

Figure 2

A New Concept: Sacred Places

Any specific location on National Forest System land, whether site, feature, or landscape, that is identified by an Indian tribe, or the religious societies, groups, clans, or practitioners of an Indian tribe, as having spiritual and cultural significance to that entity, greater than the surrounding area itself. Sacred places may include but are not limited to geological features, bodies of water, burial places, traditional cultural places, biological communities, stone and earth structures, and cultural landscapes uniquely connecting cultural sites, or features in any manner meaningful to the identifying tribe.

Non-Federally Recognized Tribes (NFRTs) are not included in Federal policies for Government-to-Government consultation. Many NFRTs, therefore, with ancestral ties to federally managed lands are not engaged prior to project development, permit consideration, and policy decisions. As a result, their ability to exercise traditional cultural practices may be compromised. In contrast, some NFRTs have no valid association with federally managed lands, except as members of the general public. There is no specific policy in this area or consistency in approach. Some Forest Service units are inclusive, recognizing, for example, that many Tribes were stripped of their Federal recognition during the “termination era” of the 1950s. Other units deal exclusively with Federally Recognized Tribes in the tribal relations context. While local line officers should exercise judgment in including NFRTs in decisionmaking, nothing in this document is intended to dissuade or discourage forests from engaging in dialogue with NFRTs. However, the agency’s trust responsibility to Tribes, its obligation to engage in consultation with Tribes, and its delivery of programmatic benefits to Tribes are restricted to Federally Recognized Tribes.

Many concerns were expressed about ownership and related issues, including rights to hunt, gather, fish, and otherwise use NFS land. We recognize concepts of “ownership” may include *treaty and other reserved rights* and acknowledge the need for resolution of native land claims in some areas. A thorough exploration of Native American land ownership and interest as it applies to the NFS is beyond the scope of this effort, but we recognize that some disputes by and among Native American Tribes, individuals, clans, corporations, and others remain.

Protection of Sacred Sites is not possible without the ability to *protect confidential information*. We acknowledge that information has been released inadvertently in the past. We recognize the 2008 Farm Bill¹⁷ presents the Forest Service with increased authority to exempt certain types of culturally sensitive information from disclosure under the Freedom of Information Act (FOIA). We also acknowledge that the language in the 2008 Farm Bill on confidentiality can be difficult to understand. Concise language that is more straightforward would set clear expectations for Tribes and agency employees as to what types of information must, may, and cannot be protected from disclosure under FOIA, and for how the information must be provided. We also acknowledge tribal members’ concerns about the Forest Service providing information to State Historic Preservation Officers, which is required under the **National Historic Preservation Act (NHPA)**. We endeavor to honor Tribes’ expectations for maintaining confidential information and pledge to develop accountable processes for information Tribes provide to the Forest Service about Sacred Sites with an expectation of confidentiality.

We heard and recognize that *Traditional Ecological Knowledge (TEK)* represents a body of knowledge that transcends Western science for many Native Americans, for whom it is at the core of their world view. Through the lens of TEK, we can see that Sacred Sites may include landscapes and biological communities. We intend that agency planning processes, such as land management planning and travel management planning, will consider TEK along with the many sources of scientific and technical information that feed the planning process.

This review focuses on lands and policies impacting the NFS, but the Forest Service also conducts scientific research through its Research and Development (R&D) branch or “deputy area,” and administers numerous assistance and conservation programs supporting other forest landowners through its State & Private Forestry (S&PF) deputy area. In addition to partnerships between NFS land managers and Tribes, there may be opportunities to leverage other Forest Service programs such as R&D monitoring or other research conducted or S&PF assistance programs, for example, the

¹⁷ Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, §§8101-8107. (June 18, 2008).

Community Forest and Open Space program to protect or accommodate access to Sacred Sites. In addition, other USDA agencies conduct research and development activities and administer assistance programs that could influence the protection of Sacred Sites on other types of land ownerships. For these reasons, we recommend this report be widely shared within the Department, as well as broadly throughout the Federal Government.

We heard resoundingly that Sacred Sites issues are seldom about archeology and historic preservation. We acknowledge the difference between an archeological perspective—protecting, preserving, and studying the physical and man-made remnants of the past—and the traditional Native American view—which seeks protection for places (including land, water, air, and living things) with special cultural and spiritual connections. Sacred Sites are relevant to Native Americans because they are necessary for the spiritual well-being of indigenous people today, of their future descendants seven generations from now, and of their ancestors.

Many respondents noted and we acknowledge that land management decisions relating to mining and energy development often degrade and desecrate Sacred Sites. These decisions, however, are often not under the exclusive control of the Forest Service. The agency must often work with and under the direction of other agencies and departments regarding decisionmaking on mining and energy projects. We recognize, however, that the Forest Service can do a better job of regulating surface uses and imposing mandatory conditions for hydropower relicensing pursuant to section 4(e) of the Federal Power Act (FPA 4(e))¹⁸ to protect Sacred Sites.

The Forest Service does not have enough law enforcement officers (LEOs) to adequately enforce laws that can protect Sacred Sites. We recognize that LEOs do not always work in a way that is clear or beneficial to Tribes. We recognize that some Forest Service LEOs have acted in ways that may seem intimidating to elders, traditional practitioners, and other indigenous users of Sacred Sites and traditional gathering areas. Many LEOs do work with Tribes to protect Native American Sacred Sites and enter into cooperative law enforcement agreements with Tribes. Forest Service LEOs in some cases can do a better job of coordinating with State, local, and tribal law enforcement agencies. Self-regulation agreements for tribal law enforcement officers can often promote greater protection of trust assets and Sacred Sites and can mitigate some of the unintended consequences of law enforcement activity.

Executive Order 13007 instructs agencies such as the Forest Service to “accommodate access to and ceremonial use of Indian Sacred Sites,” yet we heard many concerns related to accessing sites, particularly within congressionally designated wilderness. The Wilderness Act of 1964 is clear: The Forest Service cannot permit use of motorized vehicles in wilderness areas unless the designating legislation created an exception or “nonconforming use” to permit motorized use.¹⁹ We recognize this may create a burden for access for elders, for hunting and gathering needs, and for other purposes within congressionally designated wilderness. We can work to facilitate access for traditional users and elders where appropriate.²⁰

Activities associated with wildfire—before, during, and after—may affect Sacred Sites and were another area noted for action. We heard, and we recognize, there have been communication breakdowns related

¹⁸ Federal Power Act, 16 U.S.C. 797(e) (1994).

¹⁹ There are certain extremely limited exceptions; for example, for wilderness rescue.

²⁰ Under the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (43 U.S.C. 1636 et seq.), Alaska Wilderness is exempted from many of the prohibitions of the Wilderness Act, including, in some circumstances, the prohibition on motorized access. For example, ANILCA allows “...appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation.” 16 U.S.C. §3121.

to Sacred Sites between heritage staff, fire incident commanders, and line officers. We believe better communication and improved planning before a fire will lead to actions taken during a fire that are more in keeping with Tribes' desired level of protection for their Sacred Sites. Increased partnering with tribal fire crews will also help in this regard.

We intend for this review of Sacred Sites policies to reflect the agency's increased focus on its trust responsibilities, treaty obligations, and consultative engagement with Tribes. However, the Forest Service recognizes current funding and the number of full-time personnel assigned only to tribal responsibilities may fall short of the expectations of Tribes. While most Forest Service regions have some staff to work with Tribes, not all forests have staff on a full-time basis. Usually, the work the Forest Service does with Tribes is project-specific and is funded as such rather than tribal relations program activities having a dedicated budget. The work, though important, is one of many competing interests for funding. In addition, the Forest Service currently has limited leadership expertise in core competencies regarding tribal relations. The agency recognizes that it can do a better job of honoring its commitments to Tribes and protecting Sacred Sites, even at current levels of funding and staff. The Forest Service also believes that a source of regular, dedicated funding for tribal relations program activities could greatly improve its ability to partner with Tribes.

RECOMMENDATIONS

We heard many concerns, a number of compliments, and some excellent suggestions for improvement from Native Americans and from Forest Service employees. The review of the current legal environment, the compilation of listening sessions and the Forest Service employee survey, and other sources also guided the development of the recommendations below. This section recommends actions that we believe will result in the most significant improvements in the protection of Sacred Sites. These actions were chosen because they will engender an environment where line officers, managers, and staff feel they have the knowledge, support, and “permission” they need to improve communication and relationships with Native Americans and successfully carry out the direction of Executive Order 13007 in a way that is acceptable to Tribes.

These recommendations seek to strike a balance between providing sufficient guidance for purposes of achieving consistency and predictability while allowing for, and encouraging, the tailoring of local approaches to protection and consultation to respect each Tribe’s relationship with the national forest(s) Tribes value and to accommodate the preferences of tribal governments. Recommendations are loosely grouped into three main categories: Relationships/Communication, Direction/Policy, and On-the-Ground Actions, to address overarching themes we heard. Recommendations involving changes to agency directives may require additional public processes, including public comment, in addition to consultation. We do not anticipate additional funding to accomplish these recommendations, but believe that significant improvements can be accomplished without additional funds.

I. RELATIONSHIPS/COMMUNICATIONS

All agree: Without good relationships and communications between Forest Service individuals and Native American caretakers of Sacred Sites, there will never be respectful recognition and protection of Sacred Sites.

Recommendations:

A. Communication.

1. Require forests to offer regularly scheduled communication and consultation opportunities with Federally Recognized Tribes. Document commitments in an MOU, including Sacred Sites protection among topics discussed.
2. Develop a recognition system for employees and Tribal partners engaging in effective communication. Encourage those recognized to mentor and train others.

B. Training. Develop and implement a comprehensive training program for line, staff, and law enforcement personnel to provide the knowledge to build respectful relationships; to use available protection tools; and to understand laws, customs, traditions, and values related to Native American Sacred Sites. Invite Native Americans to assist in training development and teaching.

C. Staffing. Provide additional support to the agency in carrying out its trust responsibilities and other obligations to Tribes, realizing the current budget environment indicates that there will likely be continued constrained funding levels in the future that could impact staffing decisions.

1. Hold line officers accountable for fulfilling obligations to Tribes, including those related to Sacred Sites, through performance measures or other means.
2. Forest Service succession planning should include strategies to enhance diversity in its workforce and to provide for full-time tribal relations managers and liaisons where needed and if funds are available.
3. Require high-level core competencies in tribal relations where tribal partnerships and delivery of trust and treaty obligations are significant.
4. Ensure increased presence of Native American people in Forest Service program administration and advisory roles through targeted recruitment and outreach and by ensuring Native American views are represented in advisory committees. Specifically, ensure that resource advisory committees include Native American representatives.

II. DIRECTION/POLICY

Across the country, listening session participants and employee survey respondents said that the Executive order definition for Sacred Sites is flawed. Various laws hinder the agency's ability to protect Sacred Sites, but in many instances, agency decisionmakers do not use existing discretion and tools. Many believe direction and policy could be enhanced to better protect Sacred Sites.

Recommendations:

- A. Executive Order on Sacred Sites (EXECUTIVE ORDER 13007). The definition limiting Sacred Sites to "specific, discrete, narrowly delineated locations" of "religious significance" is too narrow and inconsistent with the Native American view of sacredness. Either or both of these actions could be implemented:
 1. Work to revise the Executive order definition with other Federal Departments and the White House in consultation with Tribes.
 2. Establish a new concept of "Sacred Places," and incorporate this concept into Forest Service directives and training. See proposed language, figure 2, in acknowledgements, above.
- B. Confidentiality. Without knowing the location of Sacred Sites, it is difficult to protect them. However, we heard that many Native Americans do not trust that information provided to the Forest Service will be kept confidential. The Forest Service has authority to maintain the confidentiality of some information provided by Native Americans through existing legislation, most notably the 2008 Farm Bill, but see acknowledgements, above, on confidentiality.
 1. Working with other Federal Departments and the White House, revise Executive Order 13007 by replacing "Where appropriate," with "to the maximum extent permitted by law" in the sentence referring to confidentiality.
 2. Work with Congress to develop provisions for the 2012 Farm Bill that would strengthen and simplify confidentiality requirements currently included in the 2008 Farm Bill, Section 8106.
 3. Implement confidentiality procedures and training at forest and district levels.
- C. Existing Authority and Discretion. Although laws, regulations, policies, and court decisions currently exist that enable land managers to protect Sacred Sites, we heard that the Forest Service does not always use its discretion under these authorities to do so. From some employees, we heard about the need for high-level support for land managers who might make a decision to protect and accommodate Native American use of Sacred Sites, but were concerned about repercussions from other local constituencies, Congress, or the Administration.
 1. Support line officers' use of existing authorities to protect Sacred Sites. See "Synthesis of the Legal Landscape," below.
 2. Expeditiously review and revise USDA and Forest Service directives, incorporating Sacred Sites protection. Collaboratively prioritize directives for revision that will have the greatest impact.

II. Direction/Policy Recommendations, Continued

- D. Competing Statutory Obligations. Numerous laws and policies with effects on Sacred Sites are outside agency control, such as the 1872 Mining Law, Federal Energy Regulatory Commission hydropower relicensing and transmission corridor placement, and oil and gas leasing decisions.
1. With other agencies, including the Bureau of Land Management, explore changes to the 1872 Mining Law through legislation, regulations implementing the 1872 Mining Law, or agency policies interpreting those authorities to permit greater agency discretion when Sacred Sites may be impacted by hardrock mining exploration or development activities.
 2. Use mineral withdrawal authorities to proactively protect areas that include Sacred Sites where appropriate.
 3. Use mandatory conditions in Federal Power Act hydropower relicensing procedures to protect Sacred Sites or other resources, such as fish that are sacred to Tribes.
 4. Consider Sacred Sites when prioritizing lands for acquisition or exchange.
 5. Share the results of this review with other Federal agencies to encourage them to protect and accommodate Sacred Sites.
- E. Land Management Plans. Tailor protection of Sacred Sites to an individual forest or grassland and the Native Americans concerned with those areas using the forest or grassland's resource management plan and other planning processes.
1. Using collaboration and consultation, develop wording in forest and grassland planning documents that appropriately protect Sacred Sites.
 2. Require that land management planning procedures consider protection of Sacred Sites through land use designations, standards, guidelines, or other measures appropriate to particular sites and the plan's desired future conditions.

III. ON-THE-GROUND ACTIONS

Participants in the listening sessions and surveyed Forest Service employees provided many ideas for improved on-the-ground Sacred Sites protection and interpretation of cultural and sacred areas that are currently implementable throughout the listening sessions and internal surveys. All recommendations are contingent on funding availability, and these recommendations should not be construed as commitments to request additional funding.

Recommendations:

- A. Partnerships: Partner with and recruit Native Americans using existing authorities (contracting, grants and agreements, hiring, volunteer) to help to do a better job with interpretation, law enforcement, archeology, youth involvement, firefighting, and other work and to serve as liaisons, trainers, and consultants.
 - 1. In outreach activities, specifically target Native Americans in working toward an objective of increased overall workforce diversity in the Forest Service. Increase Tribal access to partnership resources and training by providing example agreements that could achieve shared management goals and by working with Tribes to develop partnership guidance materials for a tribal audience.
- B. Access. Ensure that land managers and Tribes are aware of Farm Bill and other provisions to accommodate Native American access for religious, ceremonial, or other purposes.
- C. Protection. Increase the physical protection of Sacred Sites and their surroundings during land management activities.
 - 1. Ensure line officers and law enforcement officers and agents work in concert to protect Sacred Sites and allow appropriate access by traditional, cultural, or religious practitioners. Coordinate with tribal, State, and other local enforcement agencies to inform them of allowed, expected, and permitted activities.
 - 2. Consult on emergency activities, such as fire and other natural disasters, as early as possible to protect Sacred Sites.
 - 3. Include tribal members as stewards in monitoring Sacred Sites.
 - 4. Improve the capacity to identify, document, and maintain confidentiality of Sacred Sites information as appropriate for each Tribe and forest.

SACRED SITES AND THE FOREST SERVICE: SYNTHESIS OF THE LEGAL LANDSCAPE²¹

OVERVIEW

Federal land management agencies, including the Forest Service, operate under myriad laws, regulations, policies, and procedures that influence and direct the agencies' discretion to protect and accommodate Native American use of Sacred Sites located on Federal lands. These laws and policies range in scope and breadth from the U.S. Constitution to agency guidance manuals directing employees' actions relative to a particular statute.

Overall, land management agencies are afforded a great deal of discretion when they decide to protect Sacred Sites and have employed a number of laws and policies to support actions to protect or mitigate impacts to Sacred Sites. Conversely, land management agencies' decisions impacting Native American Sacred Sites in ways that many Native Americans consider detrimental, damaging, and sacrilegious have been treated deferentially and upheld by the courts as not violating Native Americans' constitutional, statutory, or other rights. Courts have been constrained by the often limited cause of action provided in statutes written to protect Native American Sacred Sites, ruling that these statutes do not create judicially enforceable individual rights that is, they have no "teeth."²² As such, agency-approved projects that Tribes and other Native Americans consider to be a desecration of their cherished sites and sacred resources have been upheld by courts as not imposing a substantial burden on the Tribes' free exercise of their religions, even under the Religious Freedom Restoration Act (RFRA).²³

While the Federal Government may prevail in court after months or years of litigation regarding planned actions that adversely impact Sacred Sites, the victory may come at great cost to the agency's and the Federal Government's relationship with Tribes: not only with the particular Tribe(s) whose site has been affected, but with many Native Americans throughout the country. In listening sessions throughout the country conducted for this review, we heard many people say they do not believe the laws designed to protect their interests are capable of doing so. In many cases, they do not believe the Forest Service or any other Federal agency is at all concerned with or capable of providing protection for these Sacred Sites.

There are, however, many currently existing laws, regulations, policies, and court decisions that interpret them, which the Forest Service and other Federal land management agencies can and do rely on to support their decisions to protect Sacred Sites. The synthesis below highlights many of these legal and policy tools, especially those available to the Forest Service.

²¹ This synthesis is intended to improve understanding of available authorities and the discretion they provide the agency; it is not intended to be comprehensive or all-encompassing. For more information on relevant case law and other authorities, see Appendices F, Selected Court Decisions, and G, Existing Authorities.

²² Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

²³ Navajo Nation v. USDA, 535 F.3d 1058 (9th Cir. *en banc* 2008), Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

FIRST AMENDMENT OF THE CONSTITUTION:
THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE

Federal actions that may impact tribal spiritual and traditional interests are guided by the First Amendment of the United States Constitution which provides, in pertinent part, that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" (U.S. Constitution Amendment I).

An extensive body of case law has developed regarding the two aspects of this provision, known as the Establishment Clause and the Free Exercise Clause of the First Amendment. Courts deciding matters involving the Free Exercise Clause have found that Government action does not interfere with a group's or individual's free exercise of religion except in *very limited* circumstances: when the Government's action coerces the individual to violate his religious beliefs or penalizes religious activity by denying a person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

The Supreme Court has held that the Establishment Clause generally prohibits the Government from singling out religious organizations for special treatment, whether in the form of a direct benefit or an exemption from a government requirement. The Government must "pursue a course of neutrality toward religion, favoring neither one religion over others nor religious believers over nonbelievers."²⁴ See figure 3. At the same time, the court "has long recognized that the Government may (and sometimes must) accommodate religious practices, and that it may do so without violating the Establishment Clause."²⁵ Case law developed under the Establishment Clause generally has created discretion and space for agency decisionmakers to work with Native Americans to develop reasonable accommodations for Tribes and traditional practitioners to access and protect sites and areas sacred to them.²⁶ See figure 4.

Figure 3: The Lyng Decision
The G-O Road

In **Lyng v. Northwest Indian Cemetery Protective Association**, 485 U.S. 439 (1988), the Forest Service sought to develop a road on the Six Rivers National Forest (the Gasquet-Orleans Road or "G-O Road") through an area historically used by Indians for religious and spiritual activities. An Indian organization and several individual Indians sought to prohibit the road construction, arguing that the road would violate their rights under the **Free Exercise Clause** of the First Amendment.

The Supreme Court held that the Free Exercise Clause did not prohibit the Government from constructing the proposed road because the Government's action would not coerce the Indians into violating their religious beliefs, nor would the governmental action penalize the exercise of religious rights by denying adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens.

The Court held that the Forest Service's efforts to adjust the road to minimize adverse impacts to the Indians' spiritual and religious interests in the area was in accordance with the policy of the United States as set forth in the American Indian Religious Freedom Act (AIRFA) and, at the same time, the Court determined that AIRFA provides no judicially enforceable individual right or cause of action against the Government.

²⁴ Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 696 (1994) (internal quotation omitted).

²⁵ Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 334 (1987) (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144-45 (1987)).

²⁶ For more information on court decisions involving sacred site issues, see Appendix F, Selected Court Decisions.

**Figure 4: The Access Fund Decision
Climbers and Cave Rock**

In Access Fund v. USDA (2007), the 9th Circuit upheld a decision by the Forest Service for a total, mandatory, ban on recreational rock climbing on Cave Rock, the most sacred feature within the Washoe religion, finding that the restriction did not violate the **Establishment Clause**. The court found that the Forest Service in approving the ban had acted pursuant to a **secular purpose**—the preservation of a historic and cultural area—and concluded that “even if the ban on climbing were enacted in part to mitigate interference with the Washoe’s religious practices, this objective alone would not give rise to a finding of an impermissible religious motivation.” The panel also noted “the Supreme Court has counseled that “the Constitution...affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” That is, “the government may (and sometimes must) accommodate religious practices and...it may do so without violating the Establishment Clause.”

In very broad terms, the Free Exercise clause might be thought of as a “floor”: the bare minimum that the Forest Service must do to protect Native Americans’ free religious exercise involving Sacred Sites. The Establishment Clause might be considered a “ceiling”: actions taken to protect Sacred Sites must not single out one particular religion for special treatment. Accommodation of particular religious practices, however, is permissible, particularly if Government action also serves a “secular purpose.”

All of this means the responsible official has considerable discretion when weighing alternatives that may impact a Sacred Site. Broadly speaking, this discretion is bounded by the Free Exercise Clause and the Establishment Clause.

STATUTES SUPPORTING SACRED SITE PROTECTION

Congress and the President have enacted a number of laws and Executive orders designed to protect Tribes’ traditional, cultural, and religious uses and values. In 1978, Congress enacted the **American Indian Religious Freedom Act (AIRFA)** creating a Governmentwide policy to protect Native American Sacred Sites and traditional forms of worship.²⁷ In 1979, Congress adopted the **Archaeological Resources Protection Act (ARPA)**, creating protections for archeological resources on public and tribal lands.²⁸ In 1990, Congress passed the **Native American Graves Protection and Repatriation Act (NAGPRA)** requiring Federal land managers to protect Native American graves, consult with Native American Tribes concerning religious and cultural sites and objects, and to repatriate cultural and religious items found on Federal lands.²⁹

The **Religious Freedom Restoration Act (RFRA)**, passed in 1993, reiterated that governments should not substantially burden religious exercise without compelling justification and attempted to “provide a claim or defense to persons whose religious exercise is substantially burdened by government.”^{30,31}

²⁷ 42 U.S.C. §1996.

²⁸ 16 U.S.C. §470aa - 470mm.

²⁹ 25 U.S.C. §3001.

³⁰ (42 U.S.C. 2000bb, et. seq.) Pub. L. 103-141, Sec. 7, Nov. 16, 1993, 107 Stat. 1489

³¹ Though written in part to address Tribes’ concerns with adverse outcomes in court in Lyng and other cases, the impact of RFRA, and its value in the minds and hearts of Tribes, traditional practitioners, and indigenous people, was

Under the **National Historic Preservation Act (NHPA) amendments of 1992**, properties of religious and cultural importance to a Native American Tribe may be determined eligible for inclusion on the National Register of Historic Places, and Federal agencies are directed to consult with any Tribe that attaches religious and cultural significance to such properties.^{32,}

In the **2008 Farm Bill**,³³ Congress enacted legislation “to strengthen support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Native American Tribes, in accordance with [AIRFA].”³⁴ The statute included language permitting the following:

- Reburial of human remains and cultural items on NFS land.
- Temporary closure of portions of national forests for tribal traditional cultural and religious purposes.³⁵
- Tribes use, free of charge, of trees, parts of trees, or forest products from NFS land for traditional and cultural purposes.
- The protection of the confidentiality of certain culturally sensitive information from disclosure under the Freedom of Information Act. See figure 5, right, and [Appendix C](#), 2008 Farm Bill.

Figure 5: Confidentiality

For many reasons, practical, cultural, religious, or political, tribal people may be reluctant to share information related to Sacred Sites with Federal agency personnel. Worries about members of the public vandalizing or looting Sacred Sites and concerns about increased visitation, noise, or traffic play a role in tribal peoples’ hesitation to share information about the location and uses of Sacred Sites. Moreover, in many tribal cultures, it is *strictly forbidden* to discuss the location and uses of specific sites and what makes them sacred to the Tribe with outsiders who do not practice the same life-ways, or even other members who are not elders or traditional practitioners. Much of what a Federal agency can retain out of public view is dependent on the Freedom of Information Act and specifically the exemptions to required disclosure at 5 U.S.C. §552(b).

substantially lessened by a court decision in the 9th Circuit known as Navajo Nation v. U.S. Forest Service. In this decision, the 9th Circuit, sitting *en banc*, found that a Forest Service decision to permit the use of treated wastewater (sewage effluent) for snowmaking on the “Snowbowl” Ski Area was not a “substantial burden” to the Tribes’ religion because it did not condition a benefit on the Tribes’ alteration of their practice, or coerce the Tribes under threat of sanctions to act in ways contrary to their beliefs. The 13 Tribes consider this activity to be base sacrilege and desecration of their sacred mountains (the San Francisco Peaks). The *en banc* decision included a dissent which would have held the activity was indeed a substantial burden to religious practices of the Tribes.

³² 16 U.S.C. §470a (d); see also Forest Service Manual 2363.17.

³³ Food, Conservation, and Energy Act of 2008, Pub. L. 110-246, §§8101-8106, 25 U.S.C. 3051-3056, June 18, 2008.

³⁴ *Id.* at §8101(7).

³⁵ In January 2011, this provision was entered into the CFR as a type of closure the FS may issue under special order. See “Prohibitions in Areas Designated by Order; Closure of National Forest System Lands To Protect Privacy of Tribal Activities,” 76 Fed.Reg. 3015, January 19, 2011, or 36 C.F.R. §261.53(g). See also, Appendix C.

Congress has also enacted **site-specific laws** pertaining to particular administrative units of the public land management agencies designed to authorize temporary closure for exclusive use by Indian Tribes. These statutes include authority to temporarily close portions of El Malpais National Monument in New Mexico for exclusive use by Tribes for traditional cultural and religious purposes; authority to temporarily close portions of Cibola Historical Park for Indian religious services; and similar closure authority for lands included under the California Desert Protection Act of 1994.¹⁶ U.S.C. §460uu-47; 16 U.S.C. §228i; and 16 U.S.C. §410aaa-75.

OTHER AUTHORITIES SUPPORTING SACRED SITES PROTECTION

This review has already been discussed at length in President Clinton's 1996 Executive Order 13007 on Indian Sacred Sites. Executive Order 13007 directs Federal agencies, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, to: (1) accommodate access to and ceremonial use of Indian Sacred Sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such Sacred Sites.

The Executive Order 13007 defines "Sacred Sites" as follows:

Any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the Tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

For the full text of Executive Order 13007, please see [Appendix B](#). A key feature of this definition is that Sacred Sites must be identified by Native American people.³⁶ Though Executive Order 13007 lacks a legal enforcement mechanism and the definition of Sacred Sites is unsatisfactory to many Native Americans and agency employees, the Executive Order is the clearest policy direction on Sacred Sites the Federal Government has to date.

In December 2010, the United States announced support for the **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**.³⁷ In announcing the support, President Obama stated, "The aspirations it affirms—including the respect for the institutions and rich cultures of Native peoples—are one we must always seek to fulfill...[W]hat matters far more than any resolution or declaration – are actions to match those words."³⁸ The UNDRIP is a non-binding, aspirational document. It creates no new rights under U.S. or international law, nor is it a statement of current international law. Its articles address indigenous peoples' rights to maintain culture and traditions (Article 11); to religious traditions, customs, and ceremonies (Article 12); to participate in decisionmaking in matters which would affect their rights (Article 18); and to maintain spiritual connections to traditionally owned lands (Article 25). These are excerpted in [Appendix G](#), Existing Authorities.

³⁶ This is a key distinction between "Sacred Sites" as defined by EXECUTIVE ORDER 13007, and Traditional Cultural Properties managed under the authority of the NHPA.

³⁷ For further explanation of the United States' position on the Declaration and many initiatives in Indian country, see Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples -- Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples, which was released to accompany the President's statement in support of the Declaration, at <http://www.state.gov/documents/organization/153223.pdf>.

³⁸ President Obama, White House Tribal Leaders' Summit, Washington, D.C. December 16, 2010. Available at: <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>, last referenced February 27, 2011.

GOVERNMENT'S TRUST RESPONSIBILITY TO TRIBES

The tribal trust responsibility requires the Federal Government to maintain a fiduciary relationship towards all Federally Recognized Tribes. The trustee-beneficiary relationship between the Federal Government and Indian Tribes has been described as resembling a guardian-ward relationship. The trust relationship was first recognized by the Supreme Court in its early decisions interpreting Indian treaties,³⁹ and the Court's interpretation of the trust responsibility has evolved over the years. Today, certain principles of this trust relationship are clear.

1. Support for tribal sovereignty and tribal self-government are important to the execution of the Federal trust responsibility.
2. The Federal trust responsibility applies to the lands and resources, such as fish, wildlife, and timber, which Congress has agreed or elected through treaties and statutes to protect and manage for the benefit of the Tribes. The trust responsibility also applies to the right of Tribes to govern their own reservations.
3. The trust responsibility applies to Congress, as well as all Executive Branch agencies.
4. Congress under certain laws has placed more specific trust duties upon particular Federal agencies, mainly the U.S. Department of the Interior and its Bureau of Indian Affairs.
5. Congress may unilaterally alter or terminate the terms of the trust at any time, without the Tribes' consent, provided Congress does so by an express and clear act.

Federal agencies, including land management agencies, should approach their trust responsibilities to Federally Recognized Tribes in a way that gives effect to Federal Indian policy, is protective of tribal property interests, and ensures Tribes' political and cultural well-being and survival. Government-to-Government communication is essential to understanding tribal rights and interests and fulfilling trust responsibilities to Tribes. While implementing Federal law pertaining to Federal lands, land managers should also consider how their actions will support Tribes' ability to protect their own members, manage their resources, and generally maintain their distinct cultural and political identities.

LAND MANAGEMENT PLANNING PROCESSES

The Forest Service conducts land management activities under several overarching statutes and their implementing regulations. These authorities control how the agency plans for and executes projects with on-the-ground impacts, including those that may have an impact on Sacred Sites. Two primary statutes that substantively influence all Forest Service land management decisions are the National Forest Management Act (NFMA)⁴⁰ and the National Environmental Policy Act (NEPA). Further, the

³⁹ For example, the Supreme Court observed in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) (1831), that Native American Tribes are appropriately considered as "domestic dependent nations" that are "in a state of pupilage" to the United States, resembling "that of a ward to his guardian." In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court held that Federal treaties with the Cherokee recognized the Tribe as a distinct political community which "claimed and receiv[ed] the protection of one more powerful."

⁴⁰ Forest planning regulations under NFMA at 36 CFR 219 are currently undergoing revision at time of writing this Draft Report. On February 14, 2011, the Forest Service released its proposed rule, which included a provision requiring the responsible official to request information about "native knowledge, land ethics, cultural issues, and sacred and culturally significant sites," (proposed 36 CFR 219.4(7)), and requires plan components that provide for "management of areas of tribal

Federal Land Policy and Management Act (FLPMA) directs the Forest Service to coordinate with tribal land use management planning processes. Forest Service directives at FSM 1563.01b, excerpted below, describe in brief the agency's responsibility in this regard as it pertains to Tribes. A thorough treatment of these laws and regulations' applicability to the protection of Sacred Sites is beyond the scope of this review at this time, but it is worth noting that while such plans must balance all issues related to management of NFS lands and resources, *land management plans may provide a proactive mechanism for protection of Sacred Sites.*

Forest Service Manual 1563.01b: Cooperative Land Management and Planning with Tribes

1. Coordination with Tribal Land Use Management and Planning. The Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701) at Section 202(b) provides that:

In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian Tribes by, among other things, considering the policies of approved tribal land resource management programs.

Section 202 (c)(9) of FLPMA further directs the Secretary to coordinate land use planning with Tribes, to the extent the Secretary finds practical, by keeping apprised of tribal land use plans; ensuring that consideration is given to those tribal plans that are germane in the development of land use plans for public lands; assisting in resolving inconsistencies between Federal and tribal plans; and providing for meaningful involvement in the development of land use programs, land use regulations, and land use decisions for public lands.

2. Consultation and Coordination with Tribes on Forest Planning. Regulations implementing the National Forest Management Act (NFMA) of 1976 (16 U.S.C. 1600 et seq.) direct the Forest Service to consult with and coordinate forest planning with Tribes. The land and resource management planning regulations, which implement NFMA, are set out at 36 CFR part 219. The full text of part 219 of the 1982 planning rule is set out in FSH 1909.12.

3. Consultation and Coordination with Tribes on NFS Project Planning and Decisionmaking. The National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 et seq.) and the Council on Environmental Quality (CEQ) implementing regulations at Title 40 of the Code of Federal Regulations, parts 1500-1509 (40 CFR parts 1500- 1509) require Federal agencies to invite Tribes to participate in the scoping process for projects and activities that affect Tribes and requires NEPA documentation. Section 1501.2 requires that:

The Federal agency consults early with appropriate State and local agencies and Indian Tribes and with interested persons and organizations when its own involvement is reasonably foreseeable.

Tribes with treaty rights and other federally protected rights on National Forest System lands may also meet with line officers in advance of the formal planning processes. Executive Order 13175 calls for early consultation with Tribes in the development of regulatory policies that have tribal implications (FSM 1563.01g, para. 1).

importance,” (proposed 36 CFR 219.10(b)(iii)). National Forest System Land Management Planning; Proposed Rule, 70 Fed. Reg. 8480 (proposed Feb. 14, 2011) (to be codified at 36 C.F.R. pt. 219). This Proposed Rule was developed using a collaborative process that went beyond minimum statutory requirements. The process included extensive consultation and collaboration with Tribes.

SUMMARY OF EXISTING LEGAL AUTHORITIES

The agency has many authorities at its disposal that will lend support to a decision to protect Sacred Sites. In addition to those discussed here, please see [Appendix F](#), Selected Court Decisions, and [Appendix G](#) Existing Authorities. From this review of case law, existing statutes, regulations, and policies, some general conclusions may be drawn.

- Actions protective of cultural resources, watersheds, animal communities, and other natural resources that also protect a Native American Sacred Site may serve a “secular purpose,” as well as accommodating tribal religion or other sacred resources.
- The 2008 Farm Bill provides some authority for protecting confidential information from disclosure under the Freedom of Information Act.
- Forest Service internal direction guiding agency action under NEPA (FSM 1950), NFMA (FSM 1920), Heritage Laws such as NHPA and NAGPRA (FSM 2360), Law Enforcement (FSM 5370), and Wildfire Management (FSM 5100) and other land management activities, as well as Tribal Relations (FSM 1563), may be the *policies* under the most direct control of the Forest Service and most easily amended, if necessary, to encompass more protective measures for Sacred Sites.
- Many actions are possible now under existing authority without amending policies, if the agency knows of these authorities and chooses to use them.

Recommendations for actions that are possible under existing authorities, as well as those which will require policy changes, are summarized in Section III, “Acknowledgements and Recommendations,” above.

RECOGNITION/NEXT STEPS

We want to recognize and honor the many individuals from Tribes, Native American organizations, traditional practitioners, and Forest Service employees who contributed to this review and the development of this report. We realize that it was an intensive, emotional effort. Their participation has been critical.

This report will again be modified, based on the results of scheduled Tribal consultation and further collaboration efforts. A final report will be submitted to the Secretary in November 2011. Implementation of the final recommendations will likely foster changes in how the agency makes land management decisions for the good of all Americans. Some of the recommendations will begin to be carried out immediately after the Secretary of Agriculture has a chance to approve the final report and its recommendations. Some recommendations will require changes over a longer timeframe and the agency anticipates developing an implementation plan to prioritize next steps to effect long-term change. Many recommendations will be impacted by current and future budget issues and hinge on availability of funding.

We anticipate this process will bring about meaningful changes in agency requirements, operations, and processes. We hope the improved relationships will result far outweigh any single set of recommendations. We strongly believe that a better understanding of the values connected to Sacred Sites will lead to positive changes in perspective, protection, access, and continued use of these special places across the landscape.

We believe this emerging effort will provide much-needed attention to this important concern and will truly be in furtherance of the President's commitment to tribal leaders that he reiterated again this past December when many of you may have been in Washington for his second historic meeting with tribal leaders.

Janie Hipp, USDA Senior Advisor to the Secretary for Tribal Affairs
National Telephonic Listening Session
February 14, 2011

We have [heard] a lot of specifics, and we asked for them. We wanted your experiences, and you gave them to us. We asked for some solutions, and you came up with some. We appreciate that. That is part of why we are doing this. And I hope this kind of approach represents...a collaborative process, that we try to collect information before we write a plan, before we write a policy, and hopefully we can learn to do more of that.

Jim Hubbard, Forest Service Deputy Chief for State and Private Forestry
Listening Session, Eureka, California
March 4, 2011

I as Regional Forester will be talking to my counterparts that cover all 193 million acres of National Forest System lands about the importance of us and our Line Officers engaging with you in ways that advance the cause of making sure we're protecting and treating Sacred Sites in an appropriate way.

Corbin Newman, Forest Service Regional Forester for the Southwestern Region
National Telephonic Listening Session
November 29, 2010

If we are not successful in accomplishing the purposes of this Sacred Sites review, we are all diminished.

Joel Holtrop, Forest Service Deputy Chief for National Forest Systems
Listening Session, Alaska Forum on the Environment, Anchorage, Alaska
February 6, 2011

APPENDIXES

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APPENDIX A: GLOSSARY

Glossary

Administrative Unit: The basic geographic management area under one line officer (forest, grassland, tall grass prairie) within a Forest Service region, station, or area.

Agreements: Various forms of documents describing bilateral or multilateral agreements between the Forest Service and other parties to carry out particular activities or objectives.

Alaska Native Corporation: A Regional, Urban, or Village Corporation established under the laws of the State of Alaska in accordance with the provisions of the Alaska Native Claims Settlement Act.

Executive Order: A presidential policy directive that implements or interprets a Federal statute, a constitutional provision, or a treaty.

Farm Bill: The Food, Conservation, and Energy Act of 2008, (specifically) Subtitle B—Cultural and Heritage Cooperation Authority, Sections 8101–8106, provides exclusive provisions for the Forest Service to accommodate Tribal requests for confidentiality of information, reburial of human remains, access to National Forest System (NFS) lands and forest products from NFS lands for traditional and cultural purposes.

Federally Recognized Tribe: Any Indian or Alaska Native Tribe, band, nation, pueblo, village, or other community the name of which is included on a list published periodically by the Secretary of the Interior titled “*Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs.*”

Forest Service Staff: Forest Service employees who are not line officers are usually referred to as staff.

Heritage Program: Forest Service staff area responsible for identifying, understanding, interpreting, and preserving archaeological and historical resources on National Forest System lands.

Indian Sacred Site: As used in Executive Order 13007, “. . . *any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the Tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.*”

Line Officer: A Forest Service employee delegated with the decision authority, related to land management, of the administrative unit they are assigned. The Chief has overall responsibility for the Forest Service.

Memorandum of Understanding: A written plan between the Forest Service and partners for carrying out separate activities in a coordinated and mutually beneficial manner. It also documents the framework for cooperation.

Multiple Use: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people.

Native Americans: Indigenous individuals in the continental United States and Alaska, whether or not they belong to a Federally Recognized Tribe. Individuals may also be referred to as American Indians, Alaska Natives, or Indians in law, regulations, and policies.

Native American Traditional Practitioner: A Native American person who practices the cultural, spiritual, or religious traditions passed to them in a way accepted by his or her Tribe or cultural peers. Similar terms used in this document include culture keepers, spiritual leader, clan leader, and medicine men/women/societies.

Non-Federally Recognized Tribe: Indian groups in the United States that are not recognized by the Federal Government as "Indian Tribes."

Special Use Permits: A legal document that allows occupancy, use, or other privileges on National Forest System lands. The permit is granted for a specific use of the land for a specific period of time.

State Recognized Tribe: Indian Tribes or groups that are acknowledged by a State.

Traditional Cultural Property: A property or site that is eligible for inclusion on the National Register of Historic Places because of its association with cultural practices or beliefs of a living community that are rooted in that community's history and is important to maintaining the continuing cultural identity of the community.

Traditional Ecological Knowledge (TEK): A way of knowing or understanding the world, including knowledge of the environment derived from multiple generations of indigenous peoples' interactions, observations, and experiences with their ecological systems. The TEK is place-based and culture-based knowledge in which people learn to live in and adapt to their own environment through interactions, observations, and experiences with their ecological system. This knowledge is generally not solely gained, developed by, or retained by individuals, but is rather accumulated over successive generations and is expressed through oral traditions, ceremonies, stories, dances, songs, art, and other means within a cultural context.

Tribal Consultation: An ongoing process that enables Federally Recognized Tribes to provide meaningful, timely input and, as appropriate, exchange views, information, and recommendations on Forest Service proposed policies or actions that may affect their rights or interests prior to a decision.

Tribal Relations Program: The USDA and Forest Service program advises and assists agency leadership in meeting their responsibilities under law and policy. The program also acts to leverage opportunities associated with working with tribal governments and other Native American groups and individuals.

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APPENDIX B: EXECUTIVE ORDER 13007 ON INDIAN SACRED SITES

Executive Order 13007 of May 24, 1996: Indian Sacred Sites

By the authority vested in me as President by the Constitution and the laws of the United States, in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices, it is hereby ordered:

Section 1. Accommodation of Sacred Sites. (a) In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites. Where appropriate, agencies shall maintain the confidentiality of sacred sites.

(b) For purposes of this order:

(i) “Federal lands” means any land or interests in land owned by the United States, including leasehold interests held by the United States, except Indian trust lands;

(ii) “Indian Tribe” means an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to Public Law No. 103–454, 108 Stat. 4791, and “Indian” refers to a member of such an Indian Tribe; and

(iii) “Sacred site” means any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian Tribe, or Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the Tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.

Sec. 2. Procedures. (a) Each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, as appropriate, promptly implement procedures for the purposes of carrying out the provisions of section 1 of this order, including, where practicable and appropriate, procedures to ensure reasonable notice is provided of proposed actions or land management policies that may restrict future access to or ceremonial use of, or adversely affect the physical integrity of, sacred sites. In all actions pursuant to this section, agencies shall comply with the Executive memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments.”

(b) Within 1 year of the effective date of this order, the head of each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall report to the President, through the Assistant to the President for Domestic Policy, on the implementation of this order. Such reports shall address, among other things, (i) any changes necessary to accommodate access to and ceremonial use of Indian sacred sites; (ii) any changes necessary to avoid adversely affecting the physical integrity of Indian sacred sites; and (iii) procedures implemented or proposed to facilitate consultation with appropriate Indian Tribes and religious leaders and the expeditious resolution of disputes relating to agency action on Federal lands that may adversely affect access to, ceremonial use of, or the physical integrity of sacred sites.

Sec. 3. Nothing in this order shall be construed to require a taking of vested property interests. Nor shall this order be construed to impair enforceable rights to use of Federal lands that have been granted to third parties through final agency action. For purposes of this order, “agency action” has the same meaning as in the Administrative Procedure Act (5 U.S.C. 551(13)).

Sec. 4. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party against the United States, its agencies, officers, or any person.

WILLIAM J. CLINTON

APPENDIX C: 2008 FARM BILL
CULTURAL AND HERITAGE COOPERATION AUTHORITY PROVISIONS

2008 FARM BILL CULTURAL AND HERITAGE COOPERATION AUTHORITY PROVISIONS

Excerpted from the "Food, Conservation, and Energy Act of 2008," Pub. L. 110-246, Title VIII, Forestry, Subtitle B, Cultural and Heritage Cooperation Authority, §§8101-8107. (June 18, 2008).

SEC. 8101. PURPOSES.

The purposes of this subtitle are--

- (1) to authorize the reburial of human remains and cultural items on National Forest System land, including human remains and cultural items repatriated under the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.);
- (2) to prevent the unauthorized disclosure of information regarding reburial sites, including the quantity and identity of human remains and cultural items on sites and the location of sites;
- (3) to authorize the Secretary of Agriculture to ensure access to National Forest System land, to the maximum extent practicable, by Indians and Indian Tribes for traditional and cultural purposes;
- (4) to authorize the Secretary to provide forest products, without consideration, to Indian Tribes for traditional and cultural purposes;
- (5) to authorize the Secretary to protect the confidentiality of certain information, including information that is culturally sensitive to Indian Tribes;
- (6) to increase the availability of Forest Service programs and resources to Indian Tribes in support of the policy of the United States to promote tribal sovereignty and self-determination; and
- (7) to strengthen support for the policy of the United States of protecting and preserving the traditional, cultural, and ceremonial rites and practices of Indian Tribes, in accordance with Public Law 95-341 (commonly known as the American Indian Religious Freedom Act; 42 U.S.C. 1996).

SEC. 8102. DEFINITIONS.

In this subtitle:

- (1) Adjacent site.--The term "adjacent site" means a site that borders a boundary line of National Forest System land.
- (2) Cultural items.--The term "cultural items" has the meaning given the term in section 2 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001), except that the term does not include human remains.
- (3) Human remains.--The term "human remains" means the physical remains of the body of a person of Indian ancestry.
- (4) Indian.--The term "Indian" means an individual who is a member of an Indian Tribe.
- (5) Indian Tribe.--The term "Indian Tribe" means any Indian or Alaska Native Tribe, band, nation, pueblo, village, or other community the name of which is included on a list published by the Secretary of the Interior pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994
- (6) Lineal descendant.--The term "lineal descendant" means an individual that can trace, directly and without interruption, the ancestry of the individual through the traditional kinship system of an Indian Tribe, or through the common law system of descent, to a known Indian, the human remains, funerary objects, or other sacred objects of whom are claimed by the individual.
- (7) National forest system.--The term "National Forest System" has the meaning given the term in section 11(a) of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1609(a)).

(8) Reburial site.--The term "reburial site" means a specific physical location at which cultural items or human remains are reburied.

(9) Traditional and cultural purpose.--The term "traditional and cultural purpose", with respect to a definable use, area, or practice, means that the use, area, or practice is identified by an Indian Tribe as traditional or cultural because of the long-established significance or ceremonial nature of the use, area, or practice to the Indian Tribe.

SEC. 8103. REBURIAL OF HUMAN REMAINS AND CULTURAL ITEMS.

(a) Reburial Sites- In consultation with an affected Indian Tribe or lineal descendant, the Secretary may authorize the use of National Forest System land by the Indian Tribe or lineal descendant for the reburial of human remains or cultural items in the possession of the Indian Tribe or lineal descendant that have been disinterred from National Forest System land or an adjacent site.

(b) Reburial- With the consent of the affected Indian Tribe or lineal descendant, the Secretary may recover and rebury, at Federal expense or using other available funds, human remains and cultural items described in subsection (a) at the National Forest System land identified under that subsection.

(c) Authorization of Use-

(1) IN GENERAL- Subject to paragraph (2), the Secretary may authorize such uses of reburial sites on National Forest System land, or on the National Forest System land immediately surrounding a reburial site, as the Secretary determines to be necessary for management of the National Forest System.

(2) AVOIDANCE OF ADVERSE IMPACTS- In carrying out paragraph (1), the Secretary shall avoid adverse impacts to cultural items and human remains, to the maximum extent practicable.

SEC. 8104. TEMPORARY CLOSURE FOR TRADITIONAL AND CULTURAL PURPOSES.

(a) Recognition of Historic Use- To the maximum extent practicable, the Secretary shall ensure access to National Forest System land by Indians for traditional and cultural purposes, in accordance with subsection (b), in recognition of the historic use by Indians of National Forest System land.

(b) Closing Land From Public Access-

(1) AUTHORITY TO CLOSE- Upon the approval by the Secretary of a request from an Indian Tribe, the Secretary may temporarily close from public access specifically identified National Forest System land to protect the privacy of tribal activities for traditional and cultural purposes.

(2) LIMITATION- A closure of National Forest System land under paragraph (1) shall affect the smallest practicable area for the minimum period necessary for activities of the applicable Indian Tribe.

(3) CONSISTENCY- Access by Indian Tribes to National Forest System land under this subsection shall be consistent with the purposes of Public Law 95-341 (commonly known as the American Indian Religious Freedom Act; 42 U.S.C. 1996).

SEC. 8105. FOREST PRODUCTS FOR TRADITIONAL AND CULTURAL PURPOSES.

(a) In General- Notwithstanding section 14 of the National Forest Management Act of 1976 (16 U.S.C. 472a), the Secretary may provide free of charge to Indian Tribes any trees, portions of trees, or forest products from National Forest System land for traditional and cultural purposes.

(b) Prohibition- Trees, portions of trees, or forest products provided under subsection (a) may not be used for commercial purposes.

SEC. 8106. PROHIBITION ON DISCLOSURE.

(a) Nondisclosure of Information-

(1) IN GENERAL- The Secretary shall not disclose under section 552 of title 5, United States Code (commonly known as the 'Freedom of Information Act'), information relating to--

(A) subject to subsection (b)(1), human remains or cultural items reburied on National Forest System land under section 8103; or

(B) subject to subsection (b)(2), resources, cultural items, uses, or activities that--

(i) have a traditional and cultural purpose; and

(ii) are provided to the Secretary by an Indian or Indian Tribe under an express expectation of confidentiality in the context of forest and rangeland research activities carried out under the authority of the Forest Service.

(2) LIMITATIONS ON DISCLOSURE- Subject to subsection (b)(2), the Secretary shall not be required to disclose information under section 552 of title 5, United States Code (commonly known as the '[FOIA]'), concerning the identity, use, or specific location in the National Forest System of--

(A) a site or resource used for traditional and cultural purposes by an Indian Tribe;

(B) any cultural items not covered under section 8103.

(b) Limited Release of Information-

(1) REBURIAL- The Secretary may disclose information described in subsection (a)(1)(A) if, before the disclosure, the Secretary--

(A) consults with an affected Indian Tribe or lineal descendant;

(B) determines that disclosure of the information--

(i) would advance the purposes of this subtitle; and

(ii) is necessary to protect the human remains or cultural items from harm, theft, or destruction; and

(C) attempts to mitigate any adverse impacts identified by an Indian Tribe or lineal descendant that reasonably could be expected to result from disclosure of the information.

(2) OTHER INFORMATION- The Secretary, in consultation with appropriate Indian Tribes, may disclose information described under paragraph (1)(B) or (2) of subsection (a) if the Secretary determines that disclosure of the information to the public--

(A) would advance the purposes of this subtitle;

(B) would not create an unreasonable risk of harm, theft, or destruction of the resource, site, or object, including individual organic or inorganic specimens; and

(C) would be consistent with other applicable laws.

Forest Service Regulations: 36 CFR § 261.53 – Closures for traditional and cultural purposes (76 Fed. Reg. 3015, January 19, 2011).

§ 261.53 Special closures. When provided in an order, it is prohibited to go into or be upon any area which is closed for the protection of:

* * * * *

(g) The privacy of tribal activities for traditional and cultural purposes.

Closure to protect the privacy of tribal activities for traditional and cultural purposes must be requested by an Indian Tribe; is subject to approval by the Forest Service; shall be temporary; and shall affect the smallest practicable area for the minimum period necessary for activities of the requesting Indian Tribe.

APPENDIX D: SUMMARY OF SACRED SITES LISTENING SESSIONS

Summary of Sacred Sites Listening Sessions

From November 2010 through April 2011, 55 listening sessions were held with Native Americans across the United States. Most of these sessions were in person; however, two nationwide telephonic listening session calls were also conducted. Combined, these sessions included more than 500 and possibly as many as 1,000 Native American participants. See Table 1 for dates and locations of each of the listening sessions.

Participants included representatives of Federally Recognized Tribes, Alaska Native Corporations, other State- or non-federally recognized groups, as well as Native American traditional practitioners, culture keepers, and spiritual leaders. In addition, 30 individual Native Americans submitted comments via email/mail/phone communications. USDA Office of Tribal Relations staff and USDA Forest Service employees attended each individual listening session, including the nationwide telephonic listening session calls, scheduled meetings of intertribal organizations, large and small group meetings, and meetings with individual Tribes.

For each listening session, a facilitator, line officer, or staff member who attended summarized what was heard and then entered it into a database. Comments from individual emails and letters were also entered into this database. Using the transcripts and notes from the telephonic national listening sessions, as well as the summaries from in-person listening sessions held early in the process, the Triangle Associates, Inc. (Triangle) team (as a neutral party) devised a coding system to analyze the content of each session. The Triangle team reviewed the summary of each session and noted content as being consistent with themes heard to date, including new themes to be added, and/or including nuances to be added to existing themes.

Those comments received from the listening sessions and email/mail correspondence that were specific to one Sacred Site or forest, or were specific to one event, were not included in this summary. However, these specific comments were noted in relation to the theme they referred to (such as confidentiality, access, etc.) and then were forwarded to the Tribal Relations Program manager or other relevant staff.

The USDA/ Forest Service Team reviewed these themes for consistency with the listening sessions they had attended. These themes were also reviewed by the agency leads from the appropriate Forest Service region for consistency with the listening sessions they had organized and attended.

Recommendations to address the comments from the listening sessions and those heard from other sources were developed by the teams conducting this review in collaboration with national and regional Forest Service staff. These recommendations are included in the “Acknowledgements and Recommendations” section in the main body of the report.

TABLE 1: SACRED SITES LISTENING SESSIONS DATES AND LOCATIONS

	Region(s)	Date	Location
1.	1, 2, 3, 4, 5, 6, 8, 9, 10	11/29/2010	National Listening Session Conference Call
2.	1, 2, 3, 4, 5, 6, 8, 9, 10	02/14/2011	National Listening Session Conference Call
3.	1	05/27/2010	Confederated Salish & Kootenai Tribal Preservation Department Office, Pablo, MT
4.	2	02/22/2011	Ute Mountain Ute Tribal Hotel and Resort, Towaoc, CO
5.	2	03/10/2011	Wakpa Sica Reconciliation Center, Fort Pierre, SD
6.	2	03/11/2011	Mystic Ranger District, Black Hills National Forest, Rapid City, SD
7.	3	02/09/2011	Yavapai Apache Cultural Center, Camp Verde, AZ
8.	3	02/18/2011	The Ft McDowell Recreation Center, Ft. McDowell, AZ
9.	3	02/23/2011	Zuni Tribal Cultural Preservation Office, Pueblo of Zuni, NM
10.	3	03/02/2011	Mescalero Tribal Office, Mescalero, NM
11.	3	03/04/2011	Santa Fe NF Supervisor's Office, Santa Fe, NM
12.	3	03/07/2011	Coconino National Forest Supervisor's Office, Flagstaff, AZ
13.	3	03/09/2011	Pueblo of Isleta offices, Isleta, NM
14.	3	03/11/2011	The Huhugam Heritage Center, Gila River Indian Community, Chandler, AZ
15.	3	03/11/2011	Santa Fe National Forest Headquarters, Santa Fe, NM
16.	3	03/11/2011	South Mountain Park and Preserve, Phoenix, AZ
17.	3	03/14/2011	Navajo Nation Museum, Window Rock, AZ
18.	3	03/15/2011	Coalmine Chapter, Tuba City, AZ
19.	3	03/16/2011	Shiprock Chapter House, Navajo Nation, Shiprock, NM
20.	3	03/16/2011	San Carlos Apache Tribal Court House, San Carlos, AZ
21.	3	03/16/2011	Kaibab Band of Paiute Indians Community Center, Pipe Springs, AZ
22.	3	03/21/2011	Pueblo of Acoma Tribal Office, Acoma Pueblo, NM
23.	3	04/04/2011	Pueblo of Laguna Tribal Office, Laguna, NM
24.	4, 2	03/02/2011	Joint Tribal Council Board Meeting, Ft. Washakie, WY
25.	5	03/01/2011	The Garden Pavilion, 5640 Dudley Boulevard, Sacramento, CA
26.	5	03/04/2011	Natural Resource Conservation Services Building, Eureka, CA
27.	5	03/08/2011	San Bernardino National Forest, San Bernardino, CA
28.	5	03/17/2011	Pit River Tribal Community Center, Burney, CA
29.	6	02/25/2011	Sheraton Hotel Airport, Portland, OR
30.	8, 9	04/05/2011	To Bridge A Gap Conference, Norman, OK
31.	8, 9	02/07/2011	Impact Week Meeting, Joint session of Culture & Heritage, and Natural Resources Committees, Arlington, VA
32.	9	02/03/2011	Voigt Intertribal Task Force meeting, Lac du Flambeau, WI

**TABLE 1: SACRED SITES LISTENING SESSIONS DATES AND LOCATIONS
(CONTINUED)**

	Region(s)	Date	Location
33.	9	03/02/2011	Fond du Lac Tribal Center, Fond du Lac Reservation, MN
34.	9	03/09/2011	Great Lakes Visitor Center, Ashland, WI
35.	9	03/31/2011	Chippewa National Forest Headquarters, Cass Lake, MN
36.	10	11/22/2010	Organized Village of Kasaan Offices, Kasaan, AK
37.	10	12/14/2010	Cape Fox Corporation Cultural Resources Office, Ketchikan, AK
38.	10	01/07/2011	Office of the President, Juneau, AK
39.	10	01/07/2011	Sealaska Heritage Institute Offices, Juneau, AK
40.	10	01/12/2011	Angoon Community Building, Angoon, AK
41.	10	01/14/2011	Douglas Indian Association Office, Juneau, AK
42.	10	01/26/2011	Sitka Tribe of Alaska Office, Sitka, AK
43.	10	02/01/2011	Organized Village of Kake Tribal Office, Kake, AK
44.	10	02/03/2011	Yakutat Tlingit Tribe, Yakutat, AK
45.	10	02/09/2011	Dena'ina Convention Center, Anchorage, AK
46.	10	02/14/2011	Skagway Traditional Tribe Office, Skagway, AK
47.	10	02/15/2011	Chilkat Indian Village Office, Klukwan, AK
48.	10	02/15/2011	Chilkoot Tribal Office, Haines, AK
49.	10	02/18/2011	Metlakatla Indian Community Hall, Metlakatla, AK
50.	10	02/23/2011	Kasaan Café, Kasaan, AK
51.	10	02/25/2011	Ketchikan Indian Community Board Room, Ketchikan, AK (Session 1)
52.	10	02/25/2011	Ketchikan Indian Community Board Room, Ketchikan, AK (Session 2)
53.	10	03/01/2011	Petersburg Indian Association Office, Petersburg, AK
54.	10	03/07/2011	Hoonah Indian Association Board Room, Hoonah, AK
55.	10	03/10/2011	Wrangell Cooperative Association, Wrangell, AK

APPENDIX D (Continued)

SUMMARY OF WHAT WE HEARD: SACRED SITES LISTENING SESSIONS

LISTENING SESSION THEMES

In reviewing the range of themes heard during the listening sessions, the team conducting the review found three main categories of themes were heard:

1. **The need for effective communications and relationships**—Listening session participants described communication and relationships as foundational to the protection of Sacred Sites.
2. **Authorities and tools available to the Forest Service**—Listening session participants commented on existing law and policy and the impacts of these on the protection of and access to Sacred Sites.
3. **Application of authorities and tools through management activities**—Listening session participants made suggestions on how agency management activities need to change to better protect Sacred Sites.

See below for descriptions of the range of themes heard from listening session participants in each of these categories.

1. **The Need for Effective Communications and Relationships:**

Several themes emerged from the listening sessions that centered on the relationship between agency personnel and the appropriate Native American representatives with connections to each Sacred Site. This included requests for effective ongoing communications, agreements, and partnerships. Many listening session participants noted where it was not working, and others provided examples of working relationships, agreements, and partnerships.

- a. **Ongoing, effective communication and a commitment to relationships with Native Americans is required for the agency to gain a true understanding of what Sacred Sites mean to Tribes and other Native Americans, and, therefore, to improve protection of Sacred Sites.** This was the most common suggestion or comment heard throughout the listening sessions. Participants commented that ongoing, effective communications, information sharing, and a commitment to a working relationship was foundational to honoring the Federal Trust responsibility. For example, “Develop a relationship with tribal members; go to feasts that are open to the public to show that you are interested and not just looking for an official relationship.” Examples of comments included:

- Forest Service leadership, officer, and staff turnover at the forest level significantly affects the quality of the Forest Service’s relationships with Tribes. Better policies need to be developed to involve Tribes during Forest Service leadership transitions to ensure that Memorandums of Understanding (MOUs) or other programmatic agreements continue.
- Many Tribal members and Traditional Practitioners lack modern communication tools such as email. Outreach efforts by the agency need to go beyond the use of information sent by email, posted online, and provided by telephonic listening sessions to include faxing, postal mail, and, most importantly, in-person meetings.
- The agency cannot rely on Federal Register notices as an effective means of communication as these notices are confusing and are difficult to access.

- Effective information sharing is a key component to consider for maintaining communications and relationships.
 - The annual “To Bridge A Gap” Conference offers a good model to maintain regular communications between Tribes and the Forest Service.
 - Quarterly or annual meetings with the State Historical Preservation Office, the Forest Service, and the interested Tribe were recommended to maintain good communications.
 - A range of agreements that support ongoing communications and regular meetings were noted as example models (see more on Agreements under number 3 below).
- b. **Consultation with Tribes needs to be meaningful and in-person/face to face.** We heard participants throughout the listening sessions consistently request that the agency conduct consultation much earlier in any process and in person with the appropriate decisionmakers from the agency. Tribes across the country noted their capacity to participate in consultation is overwhelmed due to the number of consultations currently underway with the Forest Service and other Federal agencies. The emphasis on consultation with decisionmakers was important to many tribal participants as we heard that “Too often what was agreed to during consultation is not what is ultimately decided upon.” Examples of suggestions heard throughout the sessions included that:
- Consultation should occur as early as possible in the development of a project, plan, or activity that may affect Sacred Sites.
 - Consultation should include face-to-face communication with medicine people, spiritual leaders, elders, and with Tribes that do not reside on their aboriginal homelands.
 - Each Tribe should have the opportunity to define how consultation is conducted with the agency.
 - Consultation always needs to occur at the regional and local forest level as this will enable Tribes to develop relationships and the trust needed to discuss specific Sacred Sites issues.
 - More advanced notice (i.e., two months) is needed to account for Tribal councils that meet infrequently.
 - Tribes need to be included very early in planning and decisionmaking processes, including involving Tribes before “scoping” under the National Environmental Policy Act (NEPA) takes place.
 - Funding to support travel to and in some cases participation in consultation was requested by many participants.
- c. **The right tribal people/Native Americans must be involved when discussing Sacred Sites.** We heard from many listening session participants about the importance of the agency involving the “right” Native American people in discussions about activities that may affect Sacred Sites. They provided examples such as:
- Communications and consultation that may include discussion of Sacred Sites should include more than tribal governmental representatives. Involving tribal spiritual leaders and elders in the Sacred Sites process is critical as many are not affiliated with a specific tribal government.
 - Forest Service officials had consulted with the incorrect individuals about removal of remains from burial sites and other similar incidents.

- Forest Service staff must know and be prepared to work and consult with not only those Tribes physically located nearby the forest, but also those Tribes for which the forest was their aboriginal homeland.
 - Members of Non-Federally Recognized Tribes requested that the agency create a formal process for how to provide access to sites for Non-Federally Recognized Tribes.
 - All Tribes that use a Sacred Site should be represented in discussions.
 - “If the Federally Recognized Tribes in the area do not have an interest in a Sacred Site, there is no mechanism to ensure that the site is protected.”
- d. **Collaborative working relationships/partnerships and cultural sensitivity are essential to the protection of Sacred Sites.** We heard from many listening session participants about the importance of working relationships and partnerships with Tribes to provide for better protection of Sacred Sites. It was noted that this protection would more likely occur if agency staff had a better understanding of the meaning of Sacred Sites to Native Americans (through cultural orientation or training provided by Native Americans) and if Native Americans were directly involved with the agency in Sacred Sites protection, interpretation, policy development, etc. Suggestions from participants included:
- Co-development and co-presentation of cultural orientation and sensitivity training for agency Line Officers, staff, enforcement officers, volunteers, and concessionaires.
 - Advisory groups at the national, regional, and/or forest level to be comprised of Tribal representatives and Native American Traditional Practitioners where appropriate to work in partnership with the agency on the development of Sacred Sites policy and procedures.
 - Participation of the appropriate Native Americans in the development of interpretation materials.
 - Training for Native Americans on working with the Forest Service.
 - Increased opportunities for internships within the Forest Service for Tribal members.
 - Native American liaisons to help with public education and outreach including tours.
 - Development of workshops about Sacred Sites and related laws such as Native American Graves Protection and Repatriation Act (NAGPRA).
 - Camps and other opportunities for Native American youth involvement.
 - Joint monitoring of sites to ensure protection.
- e. **Agreements between Tribes and the Forest Service are an important mechanism for the protection of Sacred Sites, but can also be a cause for concern.** We heard from many listening session participants that MOUs or agreements between Tribes and the agency can serve to create and maintain stronger relationships and better communications. Several participants noted that the only way to determine what is sacred is in consultation with Tribes, which may require dialogue, programmatic, or other agreements, or MOUs. Agreements that outline co-management of Sacred Sites by Tribes and the Forest Service were requested by several participants. We also heard notes of caution from some participants that establishing MOUs can risk leaving out Tribes or other Native Americans

that should participate in discussions with the Forest Service. Examples regarding agreements included:

- Requests for “co-management” agreements to protect specific Sacred Sites;
- Information sharing agreements to protect confidentiality;
- Models such as the California Historical Records and Information System; MOU regarding Tribal USDA Forest Service Relations on National Forest Lands within the Ceded Territory in Treaties of 1836, 1837, and 1842; and
- Requests for agreements or permit processes to clarify and allow for access to sites for gathering or ceremonial purposes.

f. **Examples of successes and good relationships do exist between Tribes and the Forest Service at the local and regional level.** Although we heard numerous requests for improved communications and relationships, we also heard from listening session participants about many examples of good relationships with line officers and other Forest Service staff at the local and regional level. Participants shared several models of how Tribes and agency staff are maintaining good relations, including:

- A quarterly tribal forum for each forest to keep Tribes up-to-date with Forest Service activities.
- A ceremony that acknowledged loss of cultural sites in Alaska in the 1900s helped to improve relations.
- Specific examples of individual Regional Foresters, Forest Supervisors, and Tribal Relations Program Managers and Liaisons who are working to communicate effectively, maintain good relationship with Tribes, and are actively working to protect specific Sacred Sites.

2. **Authorities and Tools Available to the Forest Service:**

We heard from numerous listening session participants about challenges with current Forest Service authorities or policies; for example, the agency’s “multiple-use” mission, the definition of Sacred Sites, and processes to maintain confidentiality. Participants also noted current laws and policies that are not being used effectively to help protect Sacred Sites, or they are written in such a way to prevent protection of Sacred Sites.

- a. **The Forest Service “multiple use” mission does not align with the protection of Sacred Sites.** We heard throughout the listening sessions that participants questioned the ability of the Forest Service to protect Sacred Sites while maintaining the current multiple use mission. Economic valuation of resources was viewed as central to the Forest Service mission and inconsistent with considering spiritual or cultural values.
- b. **The definition of what a Sacred Site is needs to be revisited/clarified/changed to reflect Native American perspectives.** Throughout the listening sessions, we heard from Native Americans that the definition of a Sacred Site needs be revisited and revised. In particular, we heard that the definition needs to reflect that Sacred Sites are often not specific locations with boundaries. Instead, they should be viewed as “cultural landscapes” that are more than just their physical location—they also include plants, animals, sound, light, and other sometimes intangible features. Example comments included:
 - The United States should continue to support the United Nations Declaration on the Rights of Indigenous Peoples as a way to demonstrate support for this broader concept of protection of Sacred Sites.

- Sacred Sites are not related to “religion” as understood under the First Amendment to the U.S. Constitution, but instead as integral to Native American culture.
- Sacred Sites include “living resources” that the National Historic Preservation Act does not recognize.
- The Executive Order 13007 on Sacred Sites needs to be revised to incorporate a much broader Native American perspective of Sacred Sites.

c. **Specific laws or policies were noted as either not being utilized effectively by the agency to protect Sacred Sites or are preventing effective protection of Sacred Sites.**

We heard throughout the listening sessions about several examples of current laws and policies that are available to the agency that could be used more effectively to help protect Sacred Sites. Additionally, some type of “accountability” was suggested so that there is some consequence if agency personnel do not use available tools to protect Sacred Sites.

Examples of law and policy perceived as underutilized included:

- 2008 Farm Bill provisions for confidentiality, reburial, and land closures (see more under number 2d below).
- The National Environmental Policy Act (NEPA).
- Incorporation of Sacred Sites protection in forest planning.
- The American Indian Religious Freedom Act (AIRFA).
- Even if a land management action is excluded from environmental analysis under NEPA, other laws may require the agency to consult before taking action. For example, §106 of the National Historic Preservation Act (NHPA) requires consultation if the area contains a site that is eligible for listing on the National Register.
- Native American Graves Protection and Repatriation Act (NAGPRA).
- Permits to allow for gathering traditional plants.

Additionally, numerous laws or policies were noted as written in a way that prevents or limits the protection of Sacred Sites. Examples included:

- 1872 Mining Act was the law most often mentioned as preventing protection of Sacred Sites.
- The Arizona-Idaho Conservation Act.
- Executive Order 13007 is not written in a way that encompasses the definition of Sacred Sites.
- AIRFA/RFRA strengthen “Substantial Burden” as it relates to line officers.
- The Tribal Forest Protection Act, which does not place enough responsibility for protection of Sacred Sites on the Forest Service.
- Antiquities Act.
- Changing definitions in NAGPRA.
- The National Forest Management Act.
- Forest Service Facility Realignment and Enhancement Act.
- The current proposed revisions to the regulations implementing the National Forest Management Act or “Planning Rule.”⁴¹

⁴¹ National Forest System Land Management Planning; Proposed Rule, 70 Fed. Reg. 8480 (proposed Feb. 14, 2011) (to be codified at 36 C.F.R. pt. 219).

- Traditional Cultural Properties do not qualify for protection.
 - Permit processes that allow for “non-natives [that] easily take artifacts from identified sacred sites...”
- d. **Confidentiality, reburial, and other specific provisions of the 2008 Farm Bill related to Sacred Sites need to be clarified.** We heard from a wide range of Tribes and Traditional Practitioners alike about confidentiality, reburial, and other concerns that could be better addressed using provisions of the 2008 Farm Bill (including Sections 8103 on Reburial on Forest Service land, 8104 on Temporary Closure of Forest Service Land for Traditional or Cultural Purposes, and 8106 on the specific Freedom of Information Act exemption preventing release of tribal confidential information). In particular, we heard from many participants that were concerned or unwilling to share information with the Forest Service because information had not been kept confidential in the past, or they did not trust that the information would be kept confidential. Examples of comments regarding confidentiality included:
- Issues with confidentiality that have occurred due to a misinterpretation or failure to implement non-disclosure provisions about sensitive Sacred Sites information.
 - Identification and inventories of Sacred Sites was challenging for many Tribes due to cultural practices. For example, for some Tribes, an individual who provides information about a site or sacred resource may no longer be allowed to access it.
 - Maintaining confidentiality is an essential part of the Federal trust responsibility.
 - Specific examples of confidentiality with geographic information system data and intellectual property.
 - The Forest Service volunteer stewardship program was a cause for concern as it is unclear what kind of information or training volunteers receive about Sacred Sites.
 - Formal or informal information sharing during consultation needs to be considered confidential.
 - Cooperative agreements like MOUs may be beneficial to help increase trust and understanding for Sacred Site confidentiality.
 - The confidentiality provisions under NHPA were noted as a model for protecting confidential information in some cases.
- e. **Sacred sites policy should be consistent across Federal land management agencies.** We heard that many participants are frustrated with the wide range of inconsistent policy for the protection of Sacred Sites across Federal agencies. Participants requested that Federal agencies and land management agencies, in particular, have a consistent policy for protection of and access to Sacred Sites. Additionally, listening session participants noted that on large developments that require multi-agency permitting, Federal agencies need to collaborate together in order to have a blanket policy with respect to consultation with Tribes.
- f. **Use of Traditional Ecological Knowledge can be a tool to benefit the protection of Sacred Sites.** We heard from several listening session participants that inclusion of Traditional Ecological Knowledge (TEK) along with western science would be a helpful mechanism for creating a balanced approach to protecting Sacred Sites.

- g. **Ownership issues regarding Sacred Sites were noted by participants as a barrier to the protection of Sacred Sites.** We heard several examples of ownership issues in relation to Native American perspectives of land ownership. Comments included:

- “Nobody owns the land; it is everyone’s obligation to care for it. It is not just the responsibility of Tribes to care for the land and specifically Sacred Sites; it is everyone’s responsibility.”
- Although Tribes may not own the land, they do not want their access to the resources on the land to be restricted.
- It is difficult to effectively protect sites that span multiple land ownership boundaries.
- Sacred Sites and artifacts should be Native owned.

3. **Application of Authorities and Tools Through Agency Management Activities:**

We heard from many listening session participants about the impacts of land management activities, enforcement, and decisionmaking on Sacred Sites protection and access. In particular, activities related to archeology, mining, energy development, and wildfire management were noted as needed changes.

- a. **Participants noted many examples of Forest Service activities and decisions that they felt have destroyed, desecrated, or negatively impacted Sacred Sites directly.** These examples were noted as limiting the ability of Native Americans to trust the Forest Service to protect Sacred Sites. Examples included:

- Impacts to sacred mountains.
- Impacts to burial sites.
- Removal of buildings or other structures.
- Altering sacred aspects of the land and landscape including loss of plants and animals.
- Impacts of development activities such as oil and gas, mining, and ski areas.
- Loss of views and other “intangible” elements of Sacred Sites.

- b. **Consider appropriate roles for archaeology activities and staff.** We heard from a wide range of listening session participants that Forest Service or consultant archaeologists cannot determine whether sites are sacred or not. Only the appropriate Native Americans can do this. Several examples were provided by listening session participants, including:

- Forest Service archaeologists need to work closely with Tribal archaeologists when accessing or researching Sacred Sites—agreements need to be established to ensure this happens.
- Traditional consultants, such as Tribal archeologists, should be included in Forest Service project analyses and compensated for their particular and specific knowledge and skills as it relates to Sacred Sites.
- All of the appropriate Tribes should be consulted before conducting any archaeological studies.
- Tribes have encountered difficulty engaging with forests on Archeological Resources Protection Act (ARPA) permits and acquiring data related to the permits.

- The NHPA defines a historic property to be 50 years old. This needs to be revisited because of the contemporary use of many Sacred Sites by Tribes.
- c. **Wildfire management/wildfire suppression activities affecting Sacred Sites.** We heard wildfire suppression activities have been conducted by the Forest Service in a manner that has severely impacted Sacred Sites. Participants requested better coordination between Tribes and firefighters to protect Sacred Sites before, during, and after wildfires. Additionally, participants told us that the use of fire retardants and pesticides on forests have caused health issues to Native American people using Sacred Sites.
- d. **Better coordination on energy development and transmission projects between Tribes, agencies, States, and companies needs to occur in order to protect Sacred Sites.** We heard from participants that Forest Service districts need to have more authority in collaborating and consulting with Tribes on energy development projects that affect Sacred Sites. For example, the Forest Service needs to work with geothermal and power line companies to protect Sacred Sites.
- e. **The impact of Navajo Nation v. Forest Service, involving the San Francisco Peaks in Northern Arizona (also known as “Snowbowl”) has impacted the protection of Sacred Sites generally and the protection of sacred mountains specifically, such as Mt. Tenabo, Mt. Graham, Mt. Taylor, and others.** Listening session participants were deeply concerned about the impacts of the San Francisco Peaks case on the protection of other sacred mountains (including Mt. Tenabo, Mt. Graham, and Mt. Taylor) and other Sacred Sites. In particular, participants felt that this case demonstrated that the Forest Service valued development interests over cultural and spiritual values. Listening session participants:
- Requested an analysis of the implications and precedent set by the San Francisco Peaks decision and the type of consultation that was conducted leading up to the lawsuit.
 - Provided examples of contamination of ceremonial and household water resources, including uranium mining and artificial snow making using reclaimed water at Snowbowl.
 - Recommended that hydrologic and geologic studies be performed on a regional basis.
- f. **Land management activities and policies often restrict access for Tribes and Native Practitioners.** We heard many examples where access was noted as critical to continue gathering, conducting ceremonies, or maintaining cultural traditions. For example, participants said “We are concerned about access to the forest to obtain materials like fir trees for tee pee poles and oak brush to construct arbors for ceremonies. Thinning and landscape treatment projects do not take into account the need for these materials.” Additionally, Wilderness Area rules and the Wilderness Act often do not take into account tribal gathering needs. For example, road closures and wilderness area designations can restrict access to Sacred Sites for elders.

- g. **Enforcement and monitoring to prevent tampering and other inappropriate activities around Sacred Sites is needed.** We heard many listening session participants describe examples where monitoring and enforcement was not happening, or not happening enough. Listening session participants requested increased monitoring and enforcement, in partnership with Tribes, to better protect Sacred Sites. For example, it was recommended that the Forest Service cross-deputize tribal enforcement officers to assist with Sacred Sites protection.
- h. **Land transfers were noted as having the potential to support or limit protection of Sacred Sites.** We heard that land transfers from private to public land can help to facilitate Tribal access to Sacred Sites located on Forest Service lands. Land transfers from public to private ownership need to include consultation with Tribes because of the possibility that burial locations or Sacred Sites located on Forest Service-managed lands might transfer into private ownership.

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APPENDIX E: SUMMARY OF FOREST SERVICE EMPLOYEE SURVEY RESPONSES

SUMMARY OF FOREST SERVICE EMPLOYEE SURVEY RESPONSES

As part of the listening effort, the team conducting the Sacred Sites review developed a short survey for Forest Service employees, focusing on line officers and tribal relations specialists. The survey posed 13 questions, covering topics such as the definition of Sacred Sites, programs and planning, and requested sharing what respondents hear from tribes about the Forest Service's ability to protect Sacred Sites. The questions are listed in the box below. More than 140 people responded, representing 52 national forests and grasslands. The results are summarized below.

QUESTIONS FROM FOREST SERVICE EMPLOYEE SURVEY ON SACRED SITES

1. Please describe your understanding of what a sacred site is and what this understanding is based on.
2. What tools have you used to accommodate or protect American Indian or Alaska Native Sacred Sites on your unit? (Which laws, treaties, policy, programs, etc.)
3. Do you have any existing Sacred Site management plans or designations on your unit, or does your Forest Plan include Sacred Sites standards and guidelines?
4. Do you have any existing Sacred Site management plans or designations on your unit, or does your Forest Plan include Sacred Sites standards and guidelines?
5. Has this plan or designation served to successfully protect Sacred Sites? If so, what led to that success?
6. Do you have specific agreements or other instruments that guide your work with tribes on issues around Sacred Sites (as a reminder Sacred Sites may include Traditional Cultural Properties, National Historic Districts, ceremonial landscape, etc)?
7. Please describe your approach to consultation with tribes including timing of consultation.
8. If you developed relationships with tribes that have led to successful Sacred Site protections, please describe your approach to the relationship and the example of success.
9. Please share the perspectives you have heard over the last several years from Tribes about the Forest Service's capability to protect Sacred Sites.
10. From your perspective, does your unit have the knowledge and capability to protect Sacred Sites? Please explain.
11. Do you have the information you need to understand Sacred Sites issues? To appropriately accommodate or protect Sacred Sites? If not, what kind of information would be helpful to you?
12. What barriers have you experienced with respect to protection of Sacred Sites?
13. What are your recommendations for changing or improving any policies, procedures, laws or regulations that would lead to a consistent level of protection of Sacred Sites, including identification, access, and protection, to meet the intent of EO 13007?

Definition: The definition of a Sacred Site given by respondents was wide ranging. Those who indicated experience working directly with tribes and tribal governments tended to define Sacred Sites in broad terms such as landscape, mountains, areas, resources, regions, lineal features, viewsheds, etc., and did not refer to the narrow, specific delineation definition of the Executive order. Many recommended that the Executive order definition be changed to give flexibility to define a Sacred Site in concert with the tribes with which they work. Those with little or no experience working with tribes, tended to only use the strict definition of the Executive order, and frequently relied on Heritage Program designations in their definition, and subsequent discussions.

Relationships: Those who have endeavored to protect a Sacred Site or special area stressed universally that having and maintaining relationships is the most critical tool. Relationships were described as extending beyond formal Government-to-Government relations, to daily relationships that enrich the individuals involved. When the Forest Service has been unable to provide the protection

tribes expect, the damage to relationships can last a very long time. People know there are many tools for strengthening relationships and have used many creative approaches in consultation with tribes, some with mixed success.

Forest Planning: With 52 forests represented by survey respondents, it appears that the Forest Service nationwide has rarely considered Sacred Sites in its past planning documents required under the National Forest Management Act and does not have many specific provisions for Sacred Site protection in current forest plans. Several forests are pursuing language that would recognize Sacred Sites, and set standards and guidelines in ongoing forest plan revision efforts, as well as through associated processes such as amendments, special designations, and other planning avenues. Of those forests that have plan provisions protective of Sacred Sites, the sites are fairly discrete, although some noted were quite large. Examples included linear trails running hundreds of miles such as the Trail of Tears and Nez Perce Trail, or a lake basin. Most forest plan provisions noted by respondents that are protective of Sacred Sites were for sites that are relatively small, for example, a dance house or a camas meadow. Those who use traditional cultural properties as a protection mechanism struggle with defining the scale and boundary.

Consultation: Many national forests follow a structured consultation process with concerned Tribes, varying from annual to quarterly meetings, with Forest Supervisors, with Rangers, and staff to staff. Some respondents participate in multi-forest, multi-Tribe meetings where it is expedient for both parties. Employees stated that face-to-face consultation is most valuable for them and Tribes. Most people understand that good relationships are what lead to effective consultation. Respondents also clearly understand the time commitment involved with true relationships and meaningful consultation. Only a small number of people did not know or did not have any specific approach to consultation. Rarely were scoping letters, required as part of a National Environmental Policy Act (NEPA) analysis, the only approach. Most respondents combined annually scheduled rounds of meetings and consultation with information sharing and discussion of the Schedule of Proposed Actions (also required as part of the agency's responsibilities under NEPA.)

Tribal Views: In response to the question about Tribal views of Forest Service efforts to protect Sacred Sites, many respondents shared that Tribes do not trust the Forest Service. Several commented that Tribes think the Forest Service does not have the willingness to protect Sacred Sites, and the 1872 Mining Law has left many Tribes wary of the agency's legal ability to follow through on any stated commitment to protect Sacred Sites. Some report frustration from Tribes that we do not seem to understand what they are telling us. "They struggle to respond to requests for site-specific effects to a Sacred Site since Sacred Sites generally are believed to exist at a broader landscape scale."

San Francisco Peaks/Arizona Snowbowl: Southwest Region (Arizona and New Mexico) respondents, and those nearby, acknowledged that relationships across the geographical region have been compromised. "They do not believe we do a good job, especially given the decision to move forward on the Arizona Snowbowl proposal. As a result, they don't believe our "consultation" efforts are sincere, and that we are really listening to their concerns about an area."

Capability: When asked if they feel prepared to address Sacred Sites, around 40 percent of respondents believed the agency has the knowledge and capability. Notably, several referenced

specific training or experience that gives them this confidence. Some respondents stated they rely on staff, a tribal liaison, or an archeologist to ensure consistent relationships. There are those, however, who are cautious and recognize their own lack of knowledge and understanding. Several people advocated more training in cross-cultural communication, cultural sensitivity, and tribal law.

Barriers: Internally, capacity remains a strong concern when it comes to program management, protection, monitoring, and enforcement. Other perceived barriers included the 1872 Mining Law. Several respondents noted conflict with the agency mission. Most respondents recommended clarification of definitions, policy, and support for decisionmakers. Many requested more training, beginning earlier in their career. Some recommended more “teeth” in existing law. Other challenges noted included funding, definition of Sacred Sites, accountability, the agency’s multiple use mandate, meeting tribal and Secretarial intent, tribal site identification issues, and cultural differences.

Recommendations: Respondents requested more personnel, funding, training, permanent full-time duties for tribal liaisons, and greater enforcement capacity. Other personnel responding challenged themselves to form better relationships, work more collaboratively with Tribes, and ensure good communication internally, as well as externally, all at the local level.

Considered alongside Tribal and Native American input from the listening sessions ([Appendix B](#), above), it is noteworthy that many observations, concerns, and recommendations are very closely aligned. Most notable is the agreement between Tribes and Forest Service employees to better define Sacred Sites in Executive Order 13007. Strong synergy also exists between Native Americans’ and Forest Service employees’ concerns and recommendations related to training, relationships, and consultation

APPENDIX F: SELECTED COURT DECISIONS

Selected Court Decisions: Annotated Listing of Significant Court Decisions Relating to Federal Land Management and Native American Sacred Sites

Fortune v. Thompson, No. 09-98, 2011 U.S. Dist. LEXIS 5343 (D. Mont. Jan. 20, 2011).

The Forest Service adopted a Travel Management Plan (TMP) for a portion of the Badger-Two Medicine area, encompassing 130,000 acres of the Lewis and Clark National Forest. The TMP substantially prohibited motorized use within the area, closing all but roughly 8 miles to motorized use and prohibiting snowmobile access in Badger-Two Medicine entirely. One of the reasons given for the motorized use restrictions was to mitigate interference with religious practices of the Blackfeet, and a Traditional Cultural District within the area. Motorized user groups and individual recreationists sued claiming the decision unduly favored the Native American religion in violation of the Establishment Clause of the Constitution. The Court held that the Plan did not run afoul of the Establishment Clause because the prohibition was entered for a secular purpose; its principal effect neither advances nor inhibits religion; and there is no “excessive entanglement” with religion resulting from enactment of the TMP. The Court emphasized that the TMP set forth “a host of secular purposes, including benefits to air quality, water quality, soil quality, wildlife habitat, and fish habitat. Consideration was also given to the Traditional Cultural District located within Badger-Two Medicine and to resources governed by the [NHPA], 16 U.S.C. § 470f.” Even if the Forest Service's consideration and decision were enacted in part to mitigate interference with the Blackfeet's religious practices, the Court found that this objective alone did not signify a constitutional violation.

Quechan Tribe v. U.S. Department of the Interior, No. 10-2241, (S.D. Cal. filed Dec. 15, 2010).

In this case involving the Bureau of Land Management's (BLM's) decision to approve a programmatic agreement authorizing an array of solar collection panels and associated transmission lines on lands managed by the BLM located within the Imperial Valley in California, the Court issued a preliminary injunction halting the project, finding that the plaintiff, Quechan Tribe, was likely to prevail on its claim that the BLM failed to adequately consult with the plaintiff under section 106 of the National Historic Preservation Act (NHPA). The Quechan Tribe claimed, and environmental analyses indicated, that the project would wholly or partially destroy archeological sites, cultural resources, prehistoric areas of settlement and use, ancient trails, and burial areas within the 6,500-acre project area. After a thorough analysis of the documentation provided by BLM supporting its claims that it adequately consulted with the Quechan and other Tribes, the Court noted the following:

- “While public informational meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don't amount to the type of “government-to-government” consultation contemplated by the regulations. This is particularly true because the Tribe's government's requests for information and meetings were frequently rebuffed or responses were extremely delayed as BLM-imposed deadlines loomed or passed.”
- “The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted. The

Tribe's consulting rights should have been respected. It is clear that did not happen here."

- "The Ninth Circuit has emphasized that consultation with Tribes must begin early, and that if consultation begins after other parties may have invested a great deal of time and money, the other parties may become entrenched and inflexible, and the government agency may be inclined to tolerate degradation it would otherwise have insisted be avoided.... [T]he fact that [Defendants] are now pressed for time and somewhat desperate after having invested a great deal of effort and money is a problem of their own making and does not weigh in their favor."

Te-Moak Tribe v. U.S. Department of the Interior, 608 F.3d. 592 (9th Cir. June 18, 2010).

This case involved the Bureau of Land Management's (BLM's) approval of expanded mineral exploration activities in the plan of operations for an existing project, the Horse Canyon/Cortez Unified Exploration Project area in northeastern Nevada. The religion and culture of the Te-Moak's Tribe of the Western Shoshone (a Federally Recognized Tribe) are inextricably linked to the landscape of the area, and the project area is located on their ancestral lands. Mount Tenabo, located within the project area, is considered a traditional locus of power and source of life for the Western Shoshone. The project area also contains many pinyon pine trees that are a focal point of Western Shoshone culture and ceremony. Numerous ancestors of the Western Shoshone are likely buried throughout the project area. The Tribe and others sued the BLM claiming various violations of NEPA, the NHPA, and the Federal Land Policy and Management Act (FLPMA). The Ninth Circuit held that the BLM violated NEPA's mandate by failing to conduct a proper analysis of the cumulative impacts of the project and other nearby reasonably foreseeable mining and energy projects on Western Shoshone cultural resources in the area. The Court found in Defendants' favor regarding Plaintiffs' claims that BLM violated NHPA (BLM's consultation with Te-Moak was adequate and its finding of "no effect" to certain cultural resources was not in error) and FLPMA (information BLM required from mining companies was sufficient for exploratory plan of operations and lack of specific drill site information was permissible at this stage).

Navajo Nation v. USDA. 535 F.3d 1058 (9th Cir. *en banc* 2008).

Located on the Coconino National Forest in Northern Arizona, the San Francisco Peaks are sacred to at least 13 Tribes and many other Native Americans in this area and elsewhere. The Forest Service authorized the use of reclaimed wastewater for snowmaking and other purposes on the Snowbowl ski area. The Ninth Circuit, sitting en banc, upheld use of reclaimed wastewater for snowmaking purposes at Snowbowl Ski Area, reversing the decision of the three judge Ninth Circuit panel in this case. The majority held that the Forest Service's decision did not violate the Religious Freedom Restoration Act (RFRA) or impose a "substantial burden" on the exercise of religion by Native Americans. The Court found that the use of recycled waste water neither coerced plaintiffs to act contrary to their religious beliefs under a threat of sanctions, nor conditioned a valuable government benefit upon conduct which would violate their religious beliefs. Specifically, the en banc panel's majority determined that "no plants, springs, natural resources, shrines with religious significance, nor ... religious ceremonies...would be physically

affected” by the use of the reclaimed wastewater. Three judges dissented, stating that the majority “misstates the evidence ... , misstates the law under the RFRA, and misunderstands the very nature of religion.” The U.S. Supreme Court declined to review the Ninth Circuit’s en banc decision.

Access Fund v. USDA, 499 F.3d 1036 (9th Cir. 2007).

The Forest Service determined that Cave Rock, a particularly important feature to the culture and religion of the Washoe Tribe, was eligible for protection as a traditional cultural property and archaeological site. Cave Rock was also an important historic travel corridor. The agency noted these and other factors in developing a management plan for the feature, and adopted an alternative that included a permanent closure from rock climbing in its decision. The Forest Service emphasized, in connection with a discussion of social practices and civil rights in the Final Environmental Impact Statement (FEIS) for the management plan, “[t]he fact that traditional history and culture at Cave Rock are sometimes discussed in religious terms does not diminish the site’s historical or cultural significance to the Washoe people.” The agency’s plan decision prohibited rock climbing on Cave Rock, and the Access Fund, a rock climbing advocacy group, sued, claiming the Forest Service had violated the Establishment Clause of the Constitution. While recognizing climbers as an important social group that values the rock, the court noted the agency’s decision served the goal of protecting environmental, historical, and cultural resources. The three-judge panel also emphasized the strong record and documentation assembled by the Forest Service. The Ninth Circuit rejected Access Fund’s contention that the ban on climbing would lead to excessive governmental entanglement with religion, due to the enforcement activities in which the Forest Service would have to engage. Instead, the court held that “[r]outine administrative or compliance activities do not constitute impermissible interference of . . . secular authorities in religious affairs.” The court distinguished two cases cited by plaintiffs involving voluntary bans and temporary closures and upheld the Forest Service’s decision. In doing so the court relied on Cholla Ready Mix (see below) and concluded “the fact that Cave Rock also derives its historical and cultural force in part from its role in Washoe religious belief and practice does not counsel the conclusion that the Forest Service acted with the purpose of advancing religion.”

<http://www.fs.fed.us/r5/tribalrelations/dat/caverock/appeals/accessfund.pdf>

Cholla Ready Mix v. Civish, 382 F .3d 969 (9th Cir. 2004).

The Ninth Circuit Court of Appeals issued a decision upholding the State of Arizona’s policy against use of material mined from Woodruff Butte, a site sacred to Native American Tribes, against a challenge alleging that the policy violated First Amendment’s Establishment Clause. In its analysis, the court focused on the basis for protection of Indian Tribes’ Sacred Sites:

Because of the unique status of Native American societies in North American history, protecting Native American shrines and other culturally-important sites has historical value for the nation as a whole, much like Greece’s preservation of the Parthenon....Similarly, because of the central role of religion in human societies, many historical treasures are or were sites of religious worship. The Establishment Clause does not require governments to ignore the historical value of religious sites. Native American sacred sites of historical value are entitled to the same protection as the many Judeo-Christian religious sites that are protected on the NRHP,

including the National Cathedral in Washington, DC; the Tuoro Synagogue, America's oldest standing synagogue ...; and numerous churches that played a pivotal role in the Civil Rights Movement...

The Ninth Circuit decision recognized the legal basis for governments to take affirmative steps to protect sites considered sacred to Indian Tribes without violating the Constitution's Establishment Clause. The decision acknowledges the cultural and historical significance of Sacred Sites as a legitimate basis for extending protection to such sites, and affirms that tribal Sacred Sites can and do have importance to the Nation as a whole, in addition to the Indian Tribes that consider them sacred.

Bear Lodge Multiple Use Association v. Babbitt, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998), aff'd on other grounds, 175 F.3d 814 (10th Cir. 1999).

This case initially involved a challenge to a National Park Service (NPS) decision not to issue commercial rock climbing permits at Devil's Tower during the month of June out of respect for the reverence many American Indians hold for Devil's Tower as a sacred site. The U.S. District Court for the District of Wyoming (D. Wyo.) issued a preliminary injunction against the Park Service's action, finding that the Plaintiffs were likely to prevail on their claim that withholding of commercial rock climbing permits impermissibly promoted religion in violation of the Establishment Clause. The NPS then revoked the commercial climbing ban.

The plaintiffs pressed forward with their claim that NPS' request that climbers voluntarily refrain from climbing Devil's Tower during June was an Establishment Clause violation. The district court upheld the voluntary ban, finding that it was a permissible accommodation, not an impermissible promotion, of religion under the Establishment Clause.

Rupert v. Director, U.S. Fish and Wildlife Service, 957 F.2d 32 (1st Cir. 1992).

Plaintiff, pastor of a church comprised of non-Indians, brought suit against the U.S. Fish and Wildlife Service challenging regulations providing an exemption for Federally Recognized Indian Tribes from the criminal prohibition on possession of eagle feathers under the Bald Eagle Protection Act. The Plaintiff alleged that Act's exemption for Indian Tribes to possess eagle parts for religious purposes violated the Establishment Clause of the Constitution by creating a preference for Native American religions over all others. The Court determined that the exemption was rationally related to a legitimate governmental interest. The Court held that the exemption for Indians was a permissible preference, basing its decision on "Congress' historical obligation to respect Native American sovereignty and to protect Native American culture." The Court also noted that the preference or exemption was supported by the legislative history and Congressional findings underlying the American Indian Religious Freedom Act (AIRFA), which establishes Federal policy to protect and preserve Native Americans' right of freedom to believe, express, and exercise their traditional religions.

Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988).

The Forest Service sought to develop a road on the Six Rivers National Forest through an area historically used by Indians for religious and spiritual activities. The Forest Service attempted to place the road to avoid archeological sites and as far as possible from sites used by Indians for

spiritual activities. Nevertheless, an Indian organization, individual Indians, and others sought a permanent injunction prohibiting the road construction, arguing that the road would violate their rights under the Free Exercise Clause of the 1st Amendment, as well as other statutory violations. The district court and court of appeals held in the Indians' favor on the 1st Amendment issue. The Supreme Court, in a 5-3 decision, reversed and remanded the lower court decisions. The majority held that the Free Exercise Clause does not prohibit the Government from constructing the proposed road because the Government's action would not coerce the Indians into violating their religious beliefs, nor would the governmental action penalize the exercise of religious rights by denying adherents an equal share of the rights, benefits, and privileges enjoyed by other citizens. The majority noted that "[t]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."

The majority noted that the Government's right to the use of its lands need not and should not dissuade it from accommodating religious practices such as those engaged in by Indian respondents. The Court noted that the Forest Service commissioned a 423 page study of the impacts of the road on cultural and religious values in the area, chose a route that best protected sites where specific rituals occur, and developed steps to reduce visual impacts of the road on the surrounding country. The Court noted the Forest Service's efforts to adjust the road to minimize adverse impacts to the Indians' spiritual and religious interests in the area more than satisfied the Government's obligations under the American Indian Religious Freedom Act (AIRFA). The Court noted that AIRFA provides no judicially enforceable individual right or cause of action against the Government.

The dissent would have upheld the lower court rulings on the 1st Amendment Free Exercise issue. In the view of the dissenting justices, the Free Exercise Clause is directed against any form of governmental action that frustrates or inhibits religious practice, not simply those governmental actions that coerce religious adherents into actions inconsistent with their beliefs. The dissent argued that where, as the lower courts found in this case, the governmental action would virtually destroy one's religious practices, that action should be found to violate the Free Exercise Clause absent some compelling governmental justification. The dissent viewed the impacts on the Indians' religious practices to be comparable to other cases in which the Court held that governmental action violated individuals' rights under the Free Exercise Clause.

U.S. v. Means, 858 F.2d 404 (8th Cir. 1988).

Defendants, principals of a group of Sioux Indians, sought to establish a permanent camp for use by members of the Sioux Tribe on 800 acres of the Black Hills National Forest as a religious, cultural, and educational community. The Forest Service denied them a special-use permit for this use, citing statutory and regulatory limitations on permits to 80 acres and 30 years duration. The Forest Service determined that to grant the permit would be inconsistent with the public interest in maintaining the integrity of the Black Hills National Forest as public land. The district court held that denial of the permit violated defendants' First Amendment right to free exercise of religion, and directed the Forest Service to issue Defendants a special use permit. On appeal, the 8th Circuit reversed the District Court order, holding that the agency had not violated defendant's First Amendment right and that the denial of defendants' special-use application for exclusive use of the area was not arbitrary and capricious. The court held that defendants failed to demonstrate that the special-use permit denial burdened the exercise of their religion.

Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983).

The Navajo and Hopi Tribes challenged a Forest Service decision authorizing developers to expand the Snowbowl Ski Area on the San Francisco Peaks in the Coconino National Forest in Arizona. The Tribes argued that the expansion would harm the Peaks and impermissibly interfere with their religious beliefs and practices. The Court upheld the Forest Service's action and concluded that the expansion would not violate the Tribes' First Amendment rights. The Court also rejected the Tribes' argument that the ski area expansion would violate AIRFA:

It is clear from the reports, and from the statutory preamble, that AIRFA requires federal agencies to learn about, and to avoid unnecessary interference with, traditional Indian religious practices. Agencies must evaluate their policies and procedures in light of the Act's purpose, and ordinarily should consult Indian leaders before approving a project likely to affect religious practices.

The court found that the Forest Service had complied with AIRFA because it had held many meetings with Indian religious practitioners and conducted public hearings on the Navajo and Hopi reservations at which practitioners testified. The views expressed there were discussed at length in the final environmental impact statement and were given due consideration in the evaluation of the alternative development schemes proposed for the Snowbowl.

Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980).

Plaintiffs, Navajo Tribe members, filed suit against the National Park Service (NPS) alleging that the operation and management of Rainbow Bridge National Monument violated their rights under the Free Exercise Clause of the First Amendment because the Government, in order to form a reservoir (Lake Powell), had flooded an area of the Monument that was a sacred location for prayer. The Tenth Circuit held that the Government's interest in maintaining the reservoir's capacity at a level that intrudes into the Monument outweighs plaintiffs' religious interest. Regarding Plaintiffs' challenge to the intrusive and disruptive presence of tourists in and around the Monument, the Court held that there was no basis in law for ordering the government to exclude the public from public areas to ensure privacy during the exercise of First Amendment rights, and that the plaintiffs did not have a constitutional right to have tourists visiting the Bridge act "in a respectful and appreciative manner."

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APPENDIX G: EXISTING AUTHORITIES

Annotated Listing of Select Statutes, Regulations, and Executive Orders Influencing Sacred Site Protection

National Historic Preservation Act (NHPA), 16 U.S.C. §470 et. seq (1966):

Properties of traditional religious and cultural importance to Indian Tribes or Native Hawaiian organizations ("traditional cultural properties") may be determined eligible for inclusion on the National Register of Historic Places. NHPA's implementing regulations, 36 CFR 800 et seq., require Indian Tribes to be invited to be a consulting party under certain circumstances. The regulations also provide that the agency may and sometimes must give Indian Tribes the opportunity to be signatories to Memoranda of Agreement arising out of the consultation process, particularly for agency undertakings on tribal lands. Tribes must be given the opportunity to participate as interested persons when an undertaking may affect properties of historic value to an Indian Tribe not on Tribal lands. When assessing information needs related to an undertaking, an agency must seek information from Indian Tribes likely to have knowledge of or concerns about historic properties in the area.

Federal Land Management and Policy Act (FLPMA), 43 U.S.C. § 1701-1784 (1976)

Under § 1712(b), the Secretary of Agriculture is directed to coordinate development and revision of land use plans for National Forest System lands with the land use planning and management programs of and for Indian Tribes by considering the policies of approved tribal land resource management programs. Under § 1712[c], the Secretary of the Interior is directed to undertake similar coordination with Indian Tribes regarding lands administered by the Bureau of Land Management during land use planning and administration.

American Indian Religious Freedom Act (AIRFA), 16 U.S.C. 1996 (1978)

AIRFA establishes the policy of the Federal Government "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." It directs the President to instruct Departments and agencies to "evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices."

Statute: http://www.nps.gov/history/local-law/fhpl_indianrelfreact.pdf

Archeological Resources Protection Act (ARPA), 16 U.S.C. §470 (1979)

ARPA was enacted to protect archeological resources on public and Indian lands and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals having collections of archaeological resources and data. Any person may apply to a Federal land manager for a permit to excavate or remove an archeological resource on public lands. ARPA contains a provision for limited confidentiality of information. Federal land managers are directed under ARPA to develop regulations to carry out the Act.

Under Forest Service regulations at 36 C.F.R. § 296.7, the Agency must notify Tribes that may consider a site of religious or cultural importance where the excavation is to occur at least 30 days prior to issuing an ARPA permit and to otherwise consult with Indian Tribes to determine under what circumstances a Tribe or group should be notified after a permit has been issued. These

regulations at §296.7(b) also instructs the Federal land manager to seek to identify **all** Indian Tribes having aboriginal or historic ties to the lands and seek to determine the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes.

Statute: http://www.nps.gov/history/local-law/fhpl_archsrcsprot.pdf

Forest Service Regulations: http://law.justia.com/cfr/title36/36cfr296_main_02.html

Alaska National Interest Lands Conservation Act of 1980 (ANILCA) (43 U.S.C. 1636 et seq.)

ANILCA recognizes subsistence hunting and fishing rights for Native and non-Native rural residents of the State of Alaska and gives them priority to subsistence resources in the event of shortages on public lands. Title VIII of the act provides that: “Except as otherwise provided in this act and other Federal laws, the taking on public lands of fish and wildlife for non-wasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes.” Section 810 of this act stipulates how subsistence rights affect land use decisions:

In determining whether to withdraw, reserve, lease, or otherwise permit the use, occupancy, or disposition of public lands under any provision of law authorizing such actions, the head of the Federal agency having primary jurisdiction over such lands or his designee shall evaluate the effect of such use, occupancy, or disposition on subsistence use and needs, the availability of other lands for the purposes sought to be achieved, and other alternatives which would reduce or eliminate the use, occupancy, or disposition of public lands needed for subsistence purposes.

Sections 811(a) and 812 direct the Secretary of the Interior to ensure both Native and non-Native rural residents have access to subsistence resources on public lands.

Alaska Native Claims Settlement Act (ANCSA) 43 U.S.C. §1613 (1971)

ANCSA provided for the immediate settlement of Alaska Native Claims. The settlement extinguished Alaska Native claims to the land by transferring titles to 12 land-based corporations and 1 nonland-based regional corporation, as well as over 200 local Village Corporations. In ANCSA, Congress sought to resolve claims of aboriginal title. ANCSA authorized the conveyance of fee title to 40 million acres of public lands in Alaska and the payment of \$962.5 million to these corporations in settlement of the claims of aboriginal title to Alaska by its Natives. Section 14(h)(1) et seq. of ANCSA describes how the Secretary of the Interior may convey fee title of existing cemeteries and historical places to the appropriate regional corporation.

Native American Grave Protection and Repatriation Act (NAGPRA) 25 U.S.C. §3001 (1990)

NAGPRA sets forth the process by which Native American cultural items, including human remains, shall be handled when excavated or discovered on Federal or tribal lands, with repatriation of such remains prioritized in favor of lineal descendants and, then, the Indian Tribe or Native Hawaiian organization that is recognized as aboriginally occupying the area of Federal land in which the items were discovered. NAGPRA directs that activities shall cease on lands where inadvertent discoveries of Native American remains are made until the items discovered have been protected and notice consistent with the statute has been provided. NAGPRA also sets forth a process by which Federal agencies and museums are to inventory Native American

cultural items in their possession, as well as a process for repatriation of such cultural items. Under NAGPRA, consultation is required under certain circumstances, including those identified in Sections 3002(c), 3002(d), 3003, 3004, and 3005.

The NAGPRA implementing regulations refer to consultation or consultation-related concerns in several sections, including (but not limited to) 43 Code of Federal Regulations (CFR) 10.5 (consultation requirements for intentional excavation or inadvertent discovery), 43 CFR 10.8 (consultation requirements for summaries), and 43 CFR 10.9 (consultation requirements for inventories). The regulations also specify other requirements for communicating with Tribes, though without requiring consultation.

Detailed information about NAGPRA and its implementing regulations is available at the National Park Service National NAGPRA Web site: <http://www.nps.gov/history/nagpra/>.

Tribal Forest Protection Act (TFPA), 25 U.S.C. §3115a (2004)

The TFPA authorizes the Secretaries of Agriculture and Interior to enter into agreements and contracts with tribal governments to carry out projects on Federal lands to protect Indian forest or range land or communities. Indian Tribes submit project proposals to the Forest Service and the Bureau of Land Management (BLM) for projects bordering or adjacent to tribal land that are intended to address fire, disease, other threats to Indian forest or range land, or where the Forest Service or BLM land is in need of restoration. The Secretaries are to respond to tribal project proposals within 120 days from the date a project proposal is submitted. The decision whether to authorize Tribes' project proposals is wholly discretionary.

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb-1 (1993)

RFRA reiterated that governments should not substantially burden religious exercise without compelling justification; and attempted to provide a claim or defense to persons whose religious exercise is substantially burdened by Government. Later amendments codified at 42 U.S.C. 1996a specifically clarified that the use of peyote by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion is lawful.

Executive Order 13175—Consultation and Coordination with Indian Tribes, November 6, 2000

Executive Order 13175 directs Federal agencies to develop an “accountable process” for ensuring meaningful and timely input by tribal officials in development of regulatory policies that have tribal implications. The Executive order applies to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Tribes, on the relationship between the Federal Government and Tribes, or on the distribution of power and responsibilities between the Federal Government and Tribes. For more information, visit

http://www.fs.fed.us/spf/tribalrelations/documents/policy/executiveorders/EO13175_11_6_00.pdf.

Executive Order 13007—Indian Sacred Sites, May 24, 1996

See Appendix B for full text.

United Nations Declaration on the Rights of Indigenous Peoples (Excerpts) (Support announced by President Obama in December 2010)

The General Assembly: Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights [\(2\)](#) and the International Covenant on Civil and Political Rights,² as well as the Vienna

Declaration and Programme of Action,⁽³⁾ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1 - Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights⁽⁴⁾ and international human rights law.

Article 2 - Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3 - Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4 - Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5 - Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6 - Every indigenous individual has the right to a nationality.

Article 7 - 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8 - 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9 - Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10 - Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11 - 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12- 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13 - 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14 - 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15 - 1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information. 2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16 - 1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination. 2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural

diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17- 1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. 2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment. 3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labor and, inter alia, employment or salary.

Article 18 - Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19 -States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20 - 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21 - 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22 - 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23 - Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24 -1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. 2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25 - Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26 - 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional

ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27 - States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28 - 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29 - 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30 - 1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31 - 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32 - 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33 - 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34 - Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35 - Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36 - 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37 - 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements. 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38 - States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39 - Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40 - Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41 - The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42 - The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43 - The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44 - All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45 - Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46 - 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. 2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and

respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. 3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

(2) See resolution 2200 A (XXI), annex.

(3) A/CONF.157/24 (Part I), chap. III.

(4) Resolution 217 A (III).

<http://www.un.org/esa/socdev/unpfii/en/drip.html>

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APPENDIX H: SUMMARY OF 2003–2007 SACRED SITES POLICY REVIEW

SUMMARY OF 2003–2007 SACRED SITES POLICY REVIEW

Introduction

In 2003, the Forest Service chartered a team to conduct a review of the agency's implementation of Executive Order 13007 on Indian Sacred Sites. That team first met in 2003 and examined the requirements of Executive Order 13007, the American Indian Religious Freedom Act, the National Historic Preservation Act, and other relevant laws. The team proceeded to conduct numerous listening sessions with Tribal leaders and citizens, traditional practitioners, and elders throughout the Western United States and in Alaska. The team also analyzed policies from the Forest Service and other agencies and interviewed Forest Service personnel at all levels of the agency. The listening sessions and interviews yielded several themes around how people felt about the agency's land management decisions and especially about how those decisions have affected Indian Sacred Sites. In 2007, the team reported to Forest Service leadership on the results of their investigations. The observations, conclusions, and themes from their work are summarized below.

Observations Expressed

In general, Tribal people, including leaders, elders, and other individuals expressed concern that their views had not been fully considered in important forest management decisions that relate to protection of and continued access to Sacred Sites. It was suggested that this situation will need to be corrected if proper and ongoing consultation and relationship-building is to be meaningful. More specifically,

- Tribal people expressed that they feel betrayed, not heard, and not valued when they speak about the importance of protecting Sacred Sites and maintaining a connection to them. Tribal representatives consistently say that traditional perspectives were not critical considerations in current land management decisions.
- Regular meetings between the Forest Service local unit and appropriate Tribes need to be encouraged and maintained. It is important to the government-to-government relationship. In addition, Tribes indicated that every forest needs to conduct open discussions on developing an agreement to deal with Sacred Sites; NAGPRA; the protection and use of traditional medicine, food, and cultural needs in their traditional homelands; and viewshed impacts.
- Tribes believe everything is sacred. Yet some areas need certain management to maintain viewsheds and access. Some areas can accommodate an appropriate level of natural resource management. Some areas are more special and can be attributed to be more critical for ceremonies, beliefs, and values. The Forest Service must work with Tribes through the consultative process to investigate what this means for protection of and access to sacred places and resources.
- When describing the importance of access to and protection of sacred sites, Tribal people related these sites are vital to the survival of all humanity and traditional people pray for all living entities.
- When Tribal representatives and traditional practitioners described what Sacred Sites were, they represented these locations at multiple geographic scales, from landscapes of mountain ranges to specific areas associated with plant gathering. They also represented sacredness in terms of temporal scale—past, present, and future.
- Tribes expressed that consideration of Traditional Ecological Knowledge (TEK) must be integrated into national forest management on an equal footing with what we term as “science.” Tribes have cultivated TEK over thousands of years and see themselves as stewards of the land. Tribes reflected that in collaboration with the Forest Service, TEK could help improve land management decisions. Because of the Federal Government's trust

responsibility, Tribes asserted that the Forest Service also has an obligation to protect indigenous cultures and promote and preserve their connection to their cultures.

- An important function of a living culture is to pass on traditional values and perspectives to members through a variety of traditional practices. Within Tribal communities, this includes hunting, gathering, processing food, and conducting religious ceremonies at historic and cultural significant sites. The activities of hunting, gathering, and conducting religious ceremonies are considered sacred by some traditional people. Associated songs, stories, protocols, and locations are also sacred.
- Tribes have established governments. These governments have and maintain internal protocols and processes that govern Tribal interactions with members and external entities. Spiritual leadership may differ in roles and responsibilities from elected governmental tribal leadership. Recognition and respect of these Tribal infrastructures and relationships with Tribal Councils and Traditional leaders will improve Forest Service relationships with Tribes.
- Tribes are concerned that the Forest Service and the Federal Government seem to be in a continual state of reorganization. The continual replacement of Forest Service personnel inevitably results in interruptions that hinder long-term relationship development between the Tribe, traditional practitioner, and/or Native Corporation, and the Forest Service. The Forest Service needs to institutionalize and integrate consultation and protocols so that regardless of personnel changes, their actions honor and incorporate the concerns of Tribal governments into land management decisions and practices. It is important and appropriate to ask Tribal governments and traditional practitioners, in particular, how to work with them.
- In emergencies, Tribes expressed a desire to have a Sacred Sites policy that could “trigger” responses at the most appropriate level to the situation and be a collaborative process. Ideally, this means a policy has been negotiated prior to an immediate need for direction and that all parties know and understand the guidance set forth in the policy. Tribal people referred to inadvertent discoveries in a NAGPRA context as an example, but then extended the idea to inadvertent discoveries of Sacred Sites in land management activities and natural disasters.

Conclusions of the Team

- More effort should go into fully considering traditional values and perspectives in management decisions.
- Regular meetings between land managers and Tribes should be held, and, where useful, should lead to agreements.
- While everything is sacred to Tribes, there are different degrees of how central and essential sacred areas and resources are to Tribes and how Tribes feel they should be protected and managed that can only be determined through consultative processes.
- Tribes believe traditional practitioners conduct their rituals for all living entities and that some Sacred Sites are vital to the survival of all humanity.
- Sacred Sites may occur at multiple geographic scales and may concern past, present, and future temporal scales.
- Traditional ecological knowledge is often connected to Sacred Sites; this must be taken into account in land management actions. Protecting indigenous cultures and promoting their connection to their cultures will improve land management decisions.
- Tribes consider Sacred Sites to be essential elements in tribal communities’ ability to pass on traditional values and perspectives through the practice of traditional activities such as hunting, gathering, processing food, and conducting religious ceremonies. Associated songs, stories, protocols, and locations are also considered sacred.

- Recognition and respect of Tribal governmental and traditional leadership structures, including internal protocols and processes, will improve Forest Service relationships with Tribes.
- Because of continual turn-over of Forest Service personnel, protocols related to Sacred Sites should be developed in consultation with Tribes and institutionalized to transcend agency personnel.
- Such protocols could extend to emergency situations and inadvertent discoveries of Sacred Sites in land management activities and natural disasters.

Themes

- **TRUST:** The importance of trust in both the Federal trust responsibility to Tribes and in the sense of interpersonal relationships between agency employees and Tribes.
- **CONFIDENTIALITY:** Whether the Forest Service can keep information confidential, that talking about Sacred Sites may be culturally prohibited, and that providing information about Sacred Sites may “quantify” it in a way that would result in restrictions.
- **CONSULTATION:** The Forest Service should consult with Federally Recognized Tribes and honor its trust responsibility. Additionally, the agency should confer with traditional practitioners and communities that have knowledge and interests in Sacred Sites and resource protection. Ensure consulting and conferring on Sacred Sites is conducted pursuant to EXECUTIVE ORDER 13007 and the American Indian Religious Freedom Act.
- **MANAGEMENT, MONITORING, AND ACCOUNTABILITY:** Concerns were expressed as to whether Forest Service officials would follow through and implement actions to honor commitments. The Forest Service should also:
 - Provide appropriate information in easily accessible ways (radio, television, Web, regular meetings)
 - Work with traditional, spiritual, and clan leaders, as well as the Tribal governments, to identify culturally/traditionally appropriate communications protocols
 - Develop and include in agency processes and policies to protect Sacred Sites and access
 - Work with Tribes on place names and heritage sites
 - Coordinate special forest products management across jurisdictional boundaries
 - The agency and Tribes should work together to resolve conflicts about Sacred Sites
 - Co-manage sites, special use areas, and other lands
- **TRAINING:** Forest Service personnel should undergo training about Tribal history, Tribal law, cross-cultural communication, and cultural sensitivities.
- **INTERPRETATION:** Interpretation of Tribal culture and sites should be developed in cooperation with Tribal people and should involve Tribal youth.
- **SPECIAL USES** (including recreation, special forest products, energy, wildlife and fish, etc.): Special uses of lands and resources of sacred importance should be done in collaboration with Tribes and reduce the impacts to Sacred Sites and traditional uses.
- **INTELLECTUAL PROPERTY RIGHTS:** Intellectual property rights, such as rock art, clan crests, etc., of Tribal people, such as rock art, clan crests, etc, should be protected.
- **NON-FEDERALLY RECOGNIZED INDIAN GROUPS AND COMMUNITIES.** Groups and communities may have traditional knowledge and historical ties to national forests; traditional practitioners and traditional communities need to be conferred with appropriately.

In addition, many Tribal people would like to see legislation making elements of Executive Order 13007 legally enforceable in court. The Tribes and agency employees who were interviewed also recognized a need to work through disagreements with respect, using mutually agreed-upon procedures for conflict and dispute resolution.

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APPENDIX I: SECRETARY VILSACK LETTER REQUESTING SACRED SITES REVIEW



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

JUL 02 2010

[REDACTED]

Dear [REDACTED]

In late January, I wrote to you expressing my hope that a creative solution could be achieved which better met the concerns of all stakeholders in the matter of snowmaking at the Arizona Snowbowl Ski Facility located on the San Francisco Peaks in the Coconino National Forest. As I have said before, this issue involves many impassioned stakeholders with real concerns. Many Tribal leaders expressed deep concern regarding protection of the sacredness of the San Francisco Peaks and because of these concerns the U. S. Department of Agriculture (USDA) took time to evaluate the situation.

Since the original Record of Decision (ROD) in 2005, which approved the use of reclaimed water, the City of Flagstaff identified and presented to USDA, a new delivery point for the snowmaking water source which allows for further natural filtration and dilution of water improving the water quality which is described as recovered-reclaimed water or stored water. The Forest Service reviewed the use of recovered-reclaimed water under the original ROD and found that it could be used within the existing framework.

My position has been one of encouraging all stakeholders to adopt the recovered-reclaimed water for snowmaking on the mountain, understanding that while not a perfect solution, it presented a workable compromise. My understanding is that the community has not yet come to consensus on a pathway forward. Therefore, the Forest Service will issue the permit allowing for either source of water and the permit will become effective 10 days from today. Providing the option for recovered-reclaimed water empowers the local community to make the final determination and bring resolution to this long standing issue.

The process underscored the need to review our procedures. Sites such as the San Francisco Peaks are special places in our country. They are important not only to Native American culture, but to our broader American community. I have asked the USDA Office of Tribal Relations to work closely with the USDA Forest Service to immediately begin convening consultative sessions with Native American leaders. This dialogue should be about how we can do a better job addressing sacred site issues while simultaneously balancing pursuit of the agency's mission to deliver forest goods and services for current and future generations. We need to examine the effectiveness of existing laws and regulations in ensuring a consistent level of sacred site protection that is more acceptable to tribes. We believe this emerging effort will provide much needed attention to this important concern, and will be in furtherance of the spirit of the President's commitments to Tribal leaders.

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I appreciate the time it has taken to get us to this moment and I realize that the stakeholders involved invested considerable time educating us and working with each other on various paths forward. Thank you for your effort in bringing this matter this far and I look forward to continuing our work together.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Tom Vilsack', with a stylized flourish at the end.

Thomas J. Vilsack
Secretary